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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED FROM THE CONTEMPORANEOUS REPORTS AND FROM THE DECISIONS IN THE HOUSE OF LORDS,
WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

Willis

VOL. CXV.

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CASES

ARGUED AND DETERMINED

IN
THE COURT OF COMMON PLEAS,

IN
Easter Term,

IN THE
TWENTY-EIGHTH YEAR OF THE REIGN OF VICTORIA. 1865.

Callaghan

The Judges who usually sat in Banco in this Term, were,—

ERLE, C. J.,

WILLES, J.,

BYLES, J., and

MONTAGUE SMITH, J.

HEARD and Another v. HOLMAN and Another. May 2.

The ship A., insured in a club (of which the defendants were managers) by one of the conditions of which it was provided, that, "in case of damage or loss by contact which any ship in this association may do to others, this society shall be liable to contribute its proportion, but not beyond the sum insured, and also law costs given in any suit or action defended by the previous consent in writing of the managers upon this policy," ran into and damaged the plaintiffs' ship B. The owners of the injured vessel caused the ship A. to be arrested under process from the Admiralty Court; whereupon her owner and the defendants, in order to procure her release, agreed that they or one of them would pay them "the amount of damage which the said ship B. has received from the said collision, and also the costs of the proceedings in the Court of Admiralty against the ship,"—to be ascertained, in case of dispute, by Mr. Richards, the average-stater:—

Held, that "the ship B." meant "the owners of the ship B.," and that the plaintiffs were entitled to recover the same measure of damages under the agreement that they would have been entitled to in the proceedings in the Admiralty Court, viz. the expenses of repairing their vessel, the costs incurred in the arrest and detention of the A., and the loss of freight during the time the B.'s repairs were going on.

THIS was an action for the breach of an agreement.

The first count of the declaration stated, that, before and at the time of the making of the agreement thereafter mentioned, the plaintiffs were the owners of a certain ship or vessel called the *Westward Ho!*, and that one C. T. Mitcheson was the owner of a certain other ship or vessel called the *Grenfells*, and the said C. T. Mitcheson had effected with the defendants, as representing the [*2] Western Insurance Club of Topsham, and also with the Sunderland

Insurance Club, represented by the said C. T. Mitcheson himself, insurances upon the said ship the Grenfells, including the usual collision clause, whereby the said insurance clubs became insurers to the said C. T. Mitcheson against the damages which he might become liable to by reason of the said ship the Grenfells running down and coming into collision with and injuring any other ship: That the said ship the Grenfells had during the continuance of the said insurance run down and come into collision with and injured the said ship of the plaintiffs called the Westward Ho!, and the said ship of the plaintiffs called the Grenfells had been thereupon arrested, and then continued under arrest at the suit of the plaintiffs, by process out of the High Court of Admiralty: That an agreement was thereupon mutually entered into between the plaintiffs and the defendants and the said C. T. Mitcheson in the words and figures following, that is to say, "An agreement made the 13th day of March, 1863, between George Heard, of Bideford, in the county of Devon, shipowner, on behalf of himself and William Heard, his copartner (under the firm of Heard, Brothers), of the first part, Charles Turner Mitcheson, of Sunderland, in the county of Durham, shipowner, of the second part, John Holman & Sons, of Topsham, in the said county of Devon, merchants, on behalf of The Western Insurance Club of Topsham aforesaid, of the third part, and Charles Turner Mitcheson, of Sunderland aforesaid, on behalf of The Sunderland Insurance Club, of the fourth part: Whereas, the said Heard, Brothers, are the owners of the ship Westward Ho!, and the said C. T. Mitcheson the owner of the ship Grenfells; and, the said ship Grenfells having run into and injured the said ship Westward Ho!, the said ship Grenfells has been arrested and now continues under arrest: And whereas, on the application of the said parties of the second, third, and fourth parts, the said Messrs. Heard, Brothers, have agreed to release the said ship Grenfells on the terms and conditions hereinafter appearing: Now, these presents witness, and the parties to these presents mutually agree with each other, as follows,—the said Messrs. Heard, Brothers, shall forthwith release the said ship Grenfells from the said arrest, and, in consideration thereof, the said parties of the second, third, and fourth parts, some or one of them, shall forthwith pay or cause to be paid to the said Messrs. Heard, Brothers, the amount of damage which the said ship Westward Ho! has received from the said collision, and that the whole of the said parties of the second, third, and fourth parts shall be and are hereby declared to be, in proportion to their respective interests, liable to pay the same amount of damages, and also the costs of the proceedings in the Court of Admiralty against the ship: And it is further agreed between the said several parties hereto, that, if any dispute or difference shall arise between the said Messrs. Heard, Brothers, and the said other parties hereto, or any or either of them, with respect to the amount of damages claimed by the said Messrs. Heard, Brothers, by reason of the said collision, the said amount shall be referred to the award and determination of W. Richards, Esq., of New City Chambers, Bishopsgate Street, London, whose decision shall be final and conclusive between the parties; and any party hereto may make these presents a rule of any one of Her Majesty's Courts at Westminster:" Averment, that afterwards the said plaintiffs did

release the said ship the Grenfells, according to the said agreement; and that a dispute then arose *between the plaintiffs and the defendants and the said other party, as to the amount of damages [4] claimed by the plaintiffs by reason of the said collision, and thereupon the said amount was referred, according to the terms of the said agreement, to the award and determination of the said William Richards, who thereupon, after entertaining the said matter so referred to him, and hearing the various allegations and evidence of the parties, duly made and published his award of and concerning the matter so referred to him, according to the terms of the said agreement, and thereupon awarded and determined that the amount of damages which the plaintiffs were entitled to be paid by reason of the said collision within the true intent and meaning of the said agreement was a certain large sum of money, to wit, the sum of 2073*l.* 0*s.* 10*d.*: That the said costs of the proceedings in the Court of Admiralty amounted to a large sum of money, to wit, the sum of 19*l.* 15*s.* 1*d.*: That all conditions precedent were performed and fulfilled necessary to entitle the plaintiffs to be paid by the defendants a large sum of money, being a proportionate part of the said several sums of money for which the defendants were liable in proportion to their said interests, and according to the terms of the said agreement, amounting in the whole to the sum of 2092*l.* 15*s.* 11*d.*; and that, although the defendants had paid to the plaintiffs part of the said sum, yet they had neglected to pay the said residue, amounting to 519*l.* 1*s.* 2*d.*, which still remained due and unpaid.

There was also a count for money had and received, and money found due upon accounts stated.

The cause was tried before Erle, C. J., at the sittings in London after Michaelmas Term last. The facts were as follows:—The plaintiffs were the owners of a ship called the Westward Ho! The defendants were *the managers of an insurance club at Topsham, in the county of Devon, in which a vessel called the Grenfells, owned [5] by one C. T. Mitcheson, was insured for 2000*l.* by a policy dated the 30th of March, 1862, subject, amongst others, to the following condition:—

“XVII. That, in case of damage or loss by contact which any ship in this association may do to others, this society shall be liable to contribute its proportion, but not beyond the sum insured, and also law costs given in any suit or action defended by the previous consent in writing of the managers upon this policy; but in no case shall this society pay for loss or damage to one or both ships more than the sum insured on this policy.”

Mitcheson's vessel the Grenfells, on the 21st of February, 1863, ran down the plaintiffs' vessel Westward Ho! off Beachy Head, whilst on a voyage to Bourdeaux. The former vessel was compelled to put back; and the owners of the Westward Ho! hearing of the collision, caused the Grenfells to be arrested on process out of the Admiralty Court. If the Grenfells was liable for this collision, the defendants, by the terms of his policy, were bound to recoup Mitcheson, her owner. Accordingly, Mitcheson, being desirous of procuring the release of the Grenfells, called upon the defendants to make some arrangement with the plaintiffs for that purpose: and in the result the

agreement of the 13th of March, 1863, set out in the declaration, was entered into; and at the request of Mitcheson a sum of 1500*l.* was paid by the defendants to the plaintiffs, without prejudice to the rights of the respective parties. The plaintiffs claiming to be entitled, in addition to the cost of repairs rendered necessary by the collision, to damages for the loss of the use of their ship whilst the repairs were going on, and the defendants and Mitcheson disputing their right thereto, the *matter was pursuant to the stipulation in the agreement referred to Mr. Richards, who on the 24th of March made his award, finding that 1337*l.* 13*s.* 6*d.* was the amount of the damage which the said ship *Westward Ho!* had received from the said collision; and, reciting in his award that the said Messrs. Heard, Brothers, having, in addition to the claim for damages which the said ship *Westward Ho!* had received from the said collision, made a claim for further damages by reason of such collision, such further damages being in respect of the detention of the *Westward Ho!* during the time the damages sustained by the said ship by the collision were being repaired, and otherwise by reason of the said collision,—such further damages not being any portion of the aforesaid damages which the said ship *Westward Ho!* had received from the said collision,—he further awarded that the sum of 735*l.* 7*s.* 4*d.* was the amount of such further damages so sustained by the said Messrs. Heard, Brothers, by reason of the said collision.

The plaintiffs had incurred costs in the Admiralty Court in respect of the detention of the *Grenfells* to the amount of 19*l.* 15*s.* 1*d.* The defendants refusing to pay either the sum awarded or these costs, the present action was brought.

A verdict was taken for the plaintiff for 519*l.* 15*s.* 1*d.*, leave being reserved to the defendants to move.

Mellish, Q. C., accordingly, in Hilary Term last, obtained a rule nisi to enter a verdict for the defendants, or a nonsuit, on the ground that the defendants were only liable for the damage which the *Westward Ho!* had sustained by the collision, and not for the further damage sustained by the plaintiffs in respect of her detention.

*7] *Lush*, Q. C., and *Watkin Williams*, now showed cause.—*The question is whether the plaintiffs' claim under the agreement of the 13th of March, 1863, is to be limited to the sum necessary to repair the damage sustained by their vessel in the collision, or whether they are not entitled to such damages as they would have recovered in the Admiralty Court or by an action in this Court, viz. loss of the freight whilst the repairs were going on. That they would have recovered in the Admiralty Court that which they now claim, is clear. The rule is stated in *Maclachlan on Shipping* 285,—“The measure of damages to be given in these cases, is, the amount of the injury sustained, subject to no deduction for new work in repairs, such as the law of insurance recognises, (a) but calculated, for actual loss, upon the principle of furnishing to the party a complete indemnification: *The Gazelle*, 2 W. Rob. Ad. 279; *The Matchless*, 10 Jurist 1017. He is not entitled, however, to a new ship for an old one, or a

(a) The insurance rule is, to assess the damage at two-thirds of the value of the new work: *Da Costa v. Newnham*, 2 T. R. 407; *Poingdestre v. Royal Exchange Assurance Company*, R. & M. 378; 2 *Arnould on Insurance*, 2d edit. p. 996.

sum equal to the gross freight which was at the time being earned, or to a supposititious claim of so much per day during her detention for repairs, made on a mere assumption that contingencies during all that time would have been certainties both as to employment and hire: *The Gazelle*, 2 W. Rob. Ad. 279; *The Clarence*, 3 W. Rob. Ad. 283. But, where a smack was run down whilst rendering salvage services to a foreign ship, the value of these, as if they had been prosperously completed, was allowed in addition to the other compensation: *The Betsy Caines*, 2 Hagg. 28. Consequential damage, when it naturally arises out of the same collision, as proximate cause thereto, is recoverable at common law, or in the Court of Admiralty in the same proceedings. Where a *fishing-smack, on a voyage to Norway for a cargo of lobsters, was disabled by a collision, the freight of the substituted vessel was allowed also: *The Yorkshireman*, 2 Hagg. 30, n. A collier from Newcastle for West Cowes was struck by the *Mellona* when off Newarp Sand: she afterwards, the same night, became unmanageable, missed stays, and stranded, becoming a total wreck; and the owners of the *Mellona* were condemned in the full value of the vessel, the presumption of law being, in the absence of proof to the contrary, that the collier became unmanageable in consequence of the prior collision: *The Mellona*, 3 W. Rob. Ad. 7. *The Blenheim*, on a dark, squally, and tempestuous night, ran foul of the *Union*, the crew of which, thinking she could not live, abandoned her for the *Blenheim*; but the *Union* was afterwards found at sea, and brought into port, and the sum of 420*l.* paid to the salvors was recovered from the owners of the *Blenheim*: *The Blenheim*, 1 Eccl. & Adm. R. 285. Whether the costs of defending a salvage suit be recoverable, as consequential damage, depends on the reasonableness of taking that course, which at common law is a question for the jury,—*Tindal v. Bell*, 11 M. & W. 228: and in the Admiralty Court for the Judge,—*The Legatus*, 1 Swab. Ad. 168. It never could have been intended by this compromise to abandon any advantage which the plaintiffs had: the only object of Mitcheson and the defendants was, to free the Grenfells from the arrest. They now rely on the words at the commencement of the agreement of the 13th of March, "the amount of damage which *the said ship Westward Ho!* has received from the said collision." That, however, obviously means the damage which her owners have sustained from the collision.

Mellish, Q. C., and *T. Jones*, in support of the rule.—*The 17th article of the association is incorporated into the agreement. The simple question is, for what the defendants have agreed to be bound. That depends upon the words of the guarantee, which limit the claimants to the damage which "the said ship *Westward Ho!* has received from the said collision." They now claim to be entitled, in addition, to consequential damage arising from the detention of the ship whilst under repair. This they clearly cannot be under this agreement. There is a remarkable resemblance between the language of the agreement and that of the 17th rule of the club, showing an intention to limit the damages recoverable against the defendants to the direct and immediate consequences of the contact. There is nothing in the agreement to contravene the sense in which the words are used in the condition.

ERLE, C. J.—The question in this case is, whether the plaintiffs are entitled to recover under the agreement of the 13th of March the same amount of damages which they would have been entitled to recover in the Court of Admiralty, by which Court the ship had been detained, provided the amount do not exceed the sum of 2000*l.* insured by the association represented by the defendants upon the ship Grenfells. I am of opinion that they are,—that is, that they are entitled to recover the expenses of repairs rendered necessary by the collision, and also compensation for the loss of the profits they would have made from the use of their vessel if the collision had not occurred. The agreement recites that the plaintiffs are the owners of the Westward Ho!, that the ship Grenfells (which was insured in the defendants' club), having run into and injured the said ship Westward Ho! the said ship Grenfells had been arrested and remained under arrest, *10] and that, on the application of (amongst others) *the defendants, the plaintiffs had agreed to release her on the terms thereafter mentioned. If the plaintiffs have given up anything there is ample consideration for the defendants' promise. Have the plaintiffs, by releasing the ship, given up their right to recover by the proceedings in the Admiralty Court damages for the loss of freight? It is contended that they have, because the agreement is that the parties of the second, third, and fourth part, some or one of them, will pay them "the amount of damage which the said ship Westward Ho! has received from the said collision." It is urged on the part of the defendants that this is confined to the injury done to the frame of the ship. I am, however, of opinion, that, without straining the language of the agreement, it may properly be held to mean any amount of damage or injury which the owners of the vessel have sustained by or in consequence of the collision. The amount of damage is, the money required to recoup the plaintiffs. I think the instrument is fairly capable of that construction. When we refer to the policy on the Grenfells, we find that the defendants contracted upon the terms mentioned in the 17th article of the club regulations, the words of which are, that "in case of *damage or loss by contact* which any ship in this association may do to others, this society shall be liable to contribute its proportion, but not beyond the sum insured; and also law costs given in any suit or action defended by the previous consent in writing of the managers upon this policy." The defendants are to pay in case of any damage which the Grenfells may do to any other ship; that may be by collision; and they are also to pay for any loss by contact of the Grenfells with any other ship. Loss by contact is, amongst other things, loss of the freight which the ship would have earned if she had *11] not been crippled by the collision. I agree with Mr. *Mellish that the defendants were placed in a position of difficulty; and I hope, that, having by this judgment paid all that they are liable for to these plaintiffs, they may be held harmless elsewhere.

BYLES, J.—I am of the same opinion. The question is, what is the meaning of the word "ship" in this agreement. Are we to give it its strict and literal meaning? or, are we to construe it as the parties evidently intended it should be construed? The consequence of the former construction would be, that the plaintiffs are to receive the amount of the actual damage done to the frame of the ship, and the

costs incurred in the Admiralty Court, but are to get nothing for the consequential damage arising from the ship's detention. Looking at the recitals and at the operative part of the agreement, I think we shall best carry out the real intention of the parties by construing "ship" to mean "the owners." The poverty of our language compels us frequently to use expressions which do not with precise accuracy define what we mean. Hence the use of many elliptical phrases: for instance, when we speak of "the Cabinet," we mean the members who sit there: so, when we speak of "the Bar," we mean the members of that body who occupy places whether within or behind the bar. I cannot entertain any doubt.

KEATING, J.—I am entirely of the same opinion. The meaning of the agreement is plain, when regard is had to the circumstances existing at the time it was entered into. The plaintiffs had the security of the Grenfells. In the proceeding in the Admiralty Court they would have recovered all they are now claiming. They gave up the security of the ship on the faith of the undertaking by the other parties to the agreement to pay them all the damages their ship had sustained by the collision. It is scarcely conceivable that the plaintiffs should have intended to part with the security they held, without getting the same amount of compensation that they would have received by retaining the Grenfells under arrest. If the agreement is fairly susceptible of a construction which will carry that intention into effect, I think we are bound to place that construction upon it.

MONTAGUE SMITH, J.—I am of the same opinion. Reading this agreement according to the most legitimate mode of construction, and having regard to the surrounding circumstances, I have no hesitation in coming to the conclusion that by "ship" the parties meant "the owners of the ship." It was, no doubt, the intention of the parties that the plaintiffs should recover under the agreement all the damages which he would have recovered by the proceedings in the Admiralty Court, and that the amount only should be referred to Mr. Richards, in case they differed. The greatest injustice would be done in this as in many cases by adhering strictly to the mere letter.

Rule discharged.

The measure of damages in the United States in cases of collision, when the element of animus is inappreciable, seems to be compensation, as in actions for breach of contract, for the direct pecuniary loss resulting as a natural or ordinary consequence from the wrong: 114 E. C. L. R. 446, note. It comprehends, in the case of a *partial* loss, expenses of repairs, and those incident to the detention, including loss of freight, or profits from the use of the vessel: 6 M'Lean 238; 4 Id. 238; Id. 589; s. c., 13 How. 101; 21 Id. 372; 2 Wallace Jr. 52; Olcott 388. The claim for loss of profits has been questioned—1 Pars. 204; 1 Conkl.

Adm. 384; 1 Abbott's Adm. 100—on the ground that such profits are too uncertain; but as the hire of vessels is regulated by market values, just as corn or iron or other commodities, the objection appears to be untenable: 114 E. C. L. R. 446, note. The early cases on which it is based are not cases of collision. By the statute of 1851, s. 3, 9 Stat. at Large 635, the liability of owners in suits for collision is limited to their interest in the vessel, and the then pending freight, which includes earnings for transporting goods of the owner: Sprague's Dec. 219. See also Sedgwick on Damages 71.

*13] *HUNT and Another v. HARRIS. *April 25.*

1. A. was lessee for ninety-nine years of premises in the city of London, the whole of which were underlet by him for improved rents to persons who took each an interest in his portion of them greater than that of a tenant from year to year:—Held, that A. was, nevertheless, liable, as an “adjoining owner,” to contribute to the expense of repairing or rebuilding a party-wall by his neighbour, under the Metropolitan Building Act, 18 & 19 Vict. c. 122.

2. Whether he had any remedy over against his under-tenants, *quære?*

THIS was an action brought to recover contribution to a party structure under the Metropolitan Building Act, 1855, 18 & 19 Vict. c. 122.

The first count of the declaration stated that the plaintiffs and the defendant were severally owners of a certain party-wall and structure within the meaning of the Metropolitan Building Act, 1855, and situate within the city of London, the said party-wall or structure being a party-wall, and situate on the west side of the premises of the plaintiffs, being No. 37, Eastcheap, and on the east side of the premises of the plaintiffs being No. 37, Eastcheap, in the city of London, which said party-wall or structure then was in a dangerous state, and defective and out of repair; and the commissioners of sewers of the city of London then caused a survey of the said party-wall and structure to be made by a competent surveyor, who duly surveyed the same, and, upon the completion of his survey, certified to the said commissioners his opinion as to the state of such party-wall and structure, to the effect that the same was in a dangerous state: that afterwards the commissioners gave and served, and caused to be given and served upon the plaintiffs and the defendant, then being such owners as aforesaid, a notice in writing in the words and figures following, that is to say,—

“Metropolitan Building Act, 1855.

“Dangerous party structures.

“To the owners and occupiers of the party structure, being a party-wall, and situate on the west side of premises No. 37, Eastcheap, and on the east side of premises No. 38, Eastcheap, in the city of London, and whomsoever else it may concern:

*14] * “In pursuance of the provisions of the said act, I hereby, as the principal clerk and for and on behalf of the commissioners of sewers of the city of London, give you and each and every of you notice, that, it having been made known to the said commissioners that the party structure as aforesaid is in a dangerous state, the said commissioners require (a) a survey of the same to be made by a competent surveyor, who, having certified that the said party-wall is in a dangerous state, the said commissioners require you forthwith to pull down the upper portion thereof where overhanging, and for the distance downwards of about six feet below the parapet; also cut away and make good with brick-work in cement—the defective portions next the street to the extent of recess in wall, the defective portion at back of premises from the girder upwards, and extending about twelve feet north therefrom, and the cracked and defective portions of the remainder of the wall; and also, as the said wall has been built without proper footings, to underpin the same with brick-work in cement, and form proper sets-off as required by the Metropolitan Building Act:

(a) *Sic.*

"And I further give you and each and every of you notice, that, if for the space of six days from the service hereof you fail to comply with the requisitions of this notice, the said commissioners will make complaint thereof before a justice of the peace, and take such other proceedings in relation to the said party structure as are authorized by the said act, and as may be necessary or expedient. Dated this 16th day of June, 1863.

(Signed)

"JOSEPH DAW.

"Sewers Office, Guildhall, London.

"N: B. This notice does not supersede the necessity of your giving the usual notice to the district surveyor two days before commencing the work of *rebuilding, &c., agreeably to the 38th [*15 section of the 18 & 19 Vict. c. 122, and Part I."

That the plaintiffs, after receiving such notice, and within a reasonable time in that behalf, and while the plaintiffs and the defendant continued such owners as aforesaid, did and caused to be done the works in the said notice specified, the same being necessary works to be done in respect of the then dangerous state of the said party-wall and structure, and of the same being defective and out of repair: that, in the doing of the said works, the plaintiffs were necessarily obliged to repair, restore, and make good the internal works and finishings of and upon No. 37, Eastcheap, aforesaid, then being such premises of the defendant as aforesaid, which said internal works and finishings were necessarily damaged and destroyed by the doing of the first-mentioned works: that the plaintiffs and the defendant always made equal use of the said party-wall and structure, and that the defendant alone made use of the said internal works and finishings: that the plaintiffs were *building-owners*, and the defendant was *adjoining-owner*, within the meaning of the said act, and the plaintiffs, as such building-owners as aforesaid, within one month after the completion of the said works, delivered to the defendant, as such adjoining-owner as aforesaid, an account in writing duly made out of the expense of the said several works, duly valued; and the defendant did not within one month after the delivery of such account declare his dissatisfaction to the party delivering the same, by notice in writing given by the defendant or his agent, and specifying his objections thereto: Averment, that all things had been done, and all times had elapsed, and all conditions had been fulfilled, necessary to entitle the plaintiffs to have and recover from the defendant, under the provisions of the said Metropolitan Building *Act, 1855, one moiety [*16 of the expense of doing the first above-mentioned works,—the said moiety being 52*l.* 15*s.* 8*d.*,—and the whole of the expense of repairing, restoring, and making good the said internal works and finishings,—the same being 33*l.* 14*s.* 1*d.*,—and to maintain this action for the recovery thereof: Breach, that the defendant had not paid either of the said sums, although duly demanded.

There were also counts for work and materials, money paid, and money found due on accounts stated.

The defendant pleaded to the first count,—1. That he was not owner of the said party-wall or structure, as alleged,—2. That the said party-wall or structure was not dangerous, as alleged,—3. That it was not made known to the commissioners of sewers of the city of

London that the said structure was in a dangerous state,—4. That the said commissioners did not require or cause to be made a survey of the said party-wall or structure, as alleged,—5. That the said party-structure was not surveyed, as alleged,—6. That the surveyor did not certify to the said commissioners his opinion to the effect that the said party-wall or structure was in a dangerous state, as alleged,—7. That, at the said times when, &c., in the first count mentioned, the said party-wall or structure had been and was made dangerous by the plaintiffs, and that, having so made the same dangerous, they of their own wrong made known the same to the said commissioners, and caused and procured the said commissioners to require the same to be surveyed, and caused the said survey, certificate, and the said notice to be given by the said commissioners, and they wrongfully caused the proceedings of the said commissioners for the purpose of throwing on the defendant part of the expense of repairing the damage done to the said party-wall or structure by themselves the plaintiffs,—8. That the *said commissioners did not give or serve, or
 *17] cause to be given or served, the notice in the first count mentioned, as therein alleged,—9. That the said works were not done or caused to be done by the plaintiffs after receiving the said notice, or within a reasonable time in that behalf, as alleged,—10. That the defendant did not make use of the said party-wall or structure, internal walls, and finishings, as alleged,—11. That the plaintiffs did not, within one month after the completion of the said works, deliver to the defendant an account in writing of the expense of the said several works, as alleged,—12. That he did, within one month after the delivery of the said account, being dissatisfied therewith, express his dissatisfaction to the plaintiffs by notice in writing given by his agent, and specifying his objections thereto,—13. That payment of the said account was not demanded of him, as alleged,—and to the common counts,—14. Never indebted. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after last Michaelmas Term, when the following facts appeared in evidence:—The plaintiffs, Messrs. Hunt & Crombie, were merchants carrying on business at Nos. 38 and 39, Eastcheap, in the city of London, of which premises they were lessees. The defendant was the lessee for the term of ninety-nine years of No. 37. The ground-floor and basement he had let to one Collins for a term of twenty-one years; the second and third floors he had demised to one Berridge, under an agreement not under seal, for four years and a half and a half-quarter; as to the first floor, no account was given; but it was assumed that it also was let to some other person at a rent.(a)

(a) Collins's lease was dated the 18th of February, 1860. It demised to him "All that the ground-floor of the messuage, &c., and the cellars under the same (as shown in a plan in the margin), together with the use of the water-closet on the first-floor of the said premises, and the right of way or passage to the same, as now used." Habendum for twenty-one years (wanting one day) from the 25th of December, 1859, at the yearly rent of 80*l.*, with (amongst others) a covenant by Collins, his executors, administrators, or assigns, to keep the demised premises in repair (damage or destruction by means of fire excepted), and also all such fixtures, improvements, and additions as at any time during the term should be erected and made in and upon and to the premises.

Berridge's agreement was dated the 26th of November, 1861. It purported to demise to him "All those the second and third floors forming part of the dwelling-house situate, &c.," from the 11th of November then instant for four years and a half and a half quarter thence next

*In the course of making some improvements upon their premises, the plaintiffs found that the party-wall between Nos. 37 [*18 and 38 was in a dangerous state; and they accordingly gave the defendant the notice required by the 85th section of the Metropolitan Building Act, 1855. The commissioners of sewers having caused a survey to be made, also gave notice to both plaintiffs and defendant, under s. 72, that the party-wall was in a dangerous state, and requiring them or one of them to repair or take it down. In compliance with this notice, the plaintiffs took down and rebuilt the party-wall, and brought this action against the defendant as "adjoining-owner" to recover the proportion of the expenses payable by him.

On the part of the defendant, it was submitted that he was not an "owner" within the meaning of the statute, inasmuch as he had parted with all his estate in the premises for an interest greater than a tenancy from year to year, and consequently that the *persons [*19 to whom he had so parted with his interest were the persons liable.(a)

For the plaintiffs it was insisted, that, inasmuch as the tenancy under the parol agreement amounted to no more than a tenancy from year to year, the defendant was at all events "owner" of part of the premises, and therefore liable.

Under the direction of his Lordship, the jury returned a verdict for the plaintiffs for the amount claimed, reserving leave to the defendant to move to enter the verdict for him if the Court should be of opinion that under the circumstances he was not liable.

Hoggins, Q. C., in Hilary Term last, obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, on the grounds,—first, that the defendant was not liable, because he had underlet all the premises for a greater term than a tenancy from year to year,—secondly, that the plaintiff could not recover, not having followed the directions of the Metropolitan Building Act, in case of a ruinous wall, as directed by ss. 72, 73.(b) He submitted, that, having demised the premises to persons having a larger interest than that of tenant from year to year, the defendant had ceased to be "the owner," within the Metropolitan Building Act, 1855: and he referred to *Mourilyan*, app., *Labalmondiere*, resp., 1 *Ellis & Ellis* 583 (E. C. L. R. vol. 102), *Cowen v. Phillips*, 88 *Beavan* 18, and *Ex parte Saffron Hill*, 24 *Law J.*, M. C. 56.

**Coleridge*, Q. C., and *Day*, now showed cause.—The question [*20 is, whether the defendant is "owner" of the adjoining premises within the 8d section of the Metropolitan Building Act, 1855, or whether he has ceased to be owner by reason of his having parted with his interest to undertenants for a greater length of tenancy than from year to year. But for the case of *Mourilyan*, app., *Labalmondiere*, resp., 1 *Ellis & Ellis* 583, it would have been confidently sub-

ensuing, at the yearly rent of 25*l*. And *Berridge* agreed to keep the said second and third floors and the water-closet on the first floor in good tenantable repair, and to deliver up the same at the end of the term in as good condition as the same then were.

(a) The interpretation-clause, s. 3, enacts that "owner" shall apply to "every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will."

(b) This latter point not having been taken at the trial, the rule as to it was abandoned on the argument.

mitted that "owner" meant either one who is in possession of the rents and profits of the premises, or one having a tenancy larger than a tenancy from year to year. By s. 72 of the act, the commissioners (of police, or, in the city of London, of sewers,) may, upon the report of their surveyor that a structure is in a dangerous state, give written notice "to the owner or occupier of such structure," "to take down, secure, or repair the same." By s. 73, "if the owner or occupier to whom notice is given as last aforesaid, fails to comply with the requisition of such notice," a justice may, upon complaint by the commissioners, "order the owner, or, on his default, the occupier," to take down, repair, or secure the structure; and, if it is not so taken down, repaired, or secured within the time named in such order, the commissioners may execute the repairs, "and all expenses incurred by the commissioners in so doing shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs." In the case referred to, the appellants, the owners in fee of premises part of which was used as a chapel, demised them for twenty-one years to one Neill, who entered into possession. The chapel was shut up and unoccupied except when used (on Sundays) for Divine Service. The appellants having failed to comply with a notice to them by the commissioners to repair and secure the wall of the chapel, and also with an order

*21] *of a justice, made upon complaint by the Commissioners, requiring the appellants to comply with the requisition of such notice, the Commissioners executed the repairs; and, on their complaint, a justice made an order on the appellants for payment of the expenses so incurred by the Commissioners. On a case stated under the 20 & 21 Vict. c. 43, the Court of Queen's Bench held that Neill was the *owner* of the premises within the meaning of the statute, and as such, was primarily liable for the expenses in question; and that the order for payment was bad for being directed to the appellants, instead of to Neill. The plaintiffs here, upon the requisition of the Commissioners, who had given them notice that the party-wall between their premises and the premises adjoining, of which the defendant was lessee for a long term, have done the required repairs, and now call upon the defendant to contribute his proportion. The defendant had demised part of his premises to one tenant for twenty-one years, and other part to another tenant, under a parol agreement, for four years and a half. [BYLES, J.—Giving him a right in equity to call for a lease.] A Court of law cannot recognise equitable interests. [MONTAGUE SMITH, J.—The construction of a statute must be the same in *all* Courts. Other part was let to a third tenant, upon terms which did not appear. If the matter had been *res integra*, it would have been contended that the plaintiffs had their election to proceed either against the defendant or against any one of the tenants, leaving him to obtain contribution from the others. The case of *Evelyn, app., Whichcord, resp.*, Ellis, B. & E. 126 (E. C. L. R. vol. 96), is virtually a decision at variance with that of *Mourilyan, app., Labalmondiere, resp.* It was there held, that, under s. 51 of the Metropolitan Buildings Act, 1855, an owner of land in fee simple,

*22] who lets it, *on a building lease at a peppercorn-rent, is not liable, as owner, to the surveyor for fees in respect of buildings

afterwards erected on such land,—a peppercorn-rent not being within the meaning of the words “of the whole or of any part of the rents or profits of any land or tenement,” in the interpretation clause. Crompton, J., there says: “I am not satisfied that the appellant here was in possession of the rents and profits. It is difficult to say that the Act does not point to either *an actual occupation or a beneficial possession of rents and profits*. Clearly the appellant was not in occupation. Was he, then, in possession of any part of the rents or profits? I think that the Legislature meant that a person should be understood to be in such possession, who, *by himself or his tenant, received either the rent or the profits*. A peppercorn-rent cannot be either rent or profits.” The latter part of s. 73 provides that the payment by the owner shall not prejudice his right to recover the expenses from any lessee or other person liable for the same. “Lessee” and “owner,” therefore, are not convertible terms. [ERLE, C. J.—As far as I can at present see, the case of *Mourilyan, app., Labalmondiere, resp.*, is directly in point. However much impressed by your argument, we must adhere to it.] The case is perhaps distinguishable. There, there was one demise co-extensive with the whole premises. Here, there are several persons in occupation of different parts under separate demises. The Act only contemplates one notice: and the defendant is in receipt of the rents and profits of the entire premises, and he consequently is the only person the plaintiffs could look to. Suppose a large building with a hall and staircase in the centre, and the rooms on either side demised to several tenants,—would the tenants of the rooms on the one side be liable to contribute to the repairs of the party-wall at *the other side? [BYLES, J.—How, if the pre- [*23 mises were mortgaged, and the mortgagee was in possession of the rents and profits?] It is not a question of legal or equitable estate; but who is in possession of “the rents and profits” of the premises. [ERLE, C. J.—The 84th and 88th sections seem to contemplate an entirety of interest. No case has decided that a lessee of one floor for a longer period than from year to year is an adjoining owner within the statute.] Then, was Berridge in possession of the second and third floors other than as tenant from year to year? The instrument under which he held could not operate as a demise: 8 & 9 Vict. c. 106, s. 3. It only created a tenancy from year to year: *Tress v. Savage*, 4 Ellis & B. 36 (E. C. L. R. vol. 82); *Stratton v. Pettit*, 16 C. B. 420 (E. C. L. R. vol. 81). It may be that he would be entitled in equity to enforce something more. [BYLES, J.—Was he by the agreement to repair?] It must be assumed he was. *Cowen v. Phillips*, 33 Beavan 18, has but little application: the sole purport of the decision there was, to protect a person having an equitable interest. It may well be, that, where a man has an interest of that sort, a Court of equity would say that that interest should not be affected without notice to him. [BYLES, J.—That proceeds upon the ground that a Court of equity considers that to be done which is contracted to be done.]

Hoggins, Q. C., and *M'Intyre*, in support of the rule.—The defendant has parted with all his interest in the premises for a longer period of time than is described in the 3d section of the Metropolitan Building Act, 1855, as constituting an “owner.” Upon the decided cases,

therefore, he is clearly not liable to contribute to the expenses of the party-wall in question. The definition of "owner" in s. 3 is, "every
 *24] person in possession or receipt either of the whole or of any
 *part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will." The language of the interpretation clause of the former Metropolitan Building Act, 7 & 8 Vict. c. 84, was similar. A house occupied by a tenant under a lease for twenty-one years was during the term accidentally burnt, and, being ruinous, was pulled down under the provisions of that Act. By the lease, the tenant was exempted from the payment of rent for the time that the house was untenable by reason of an accidental fire. It was held in *Ex parte The Overseers of Saffron Hill*, 24 Law J., M. C. 56, that the expenses thereby incurred could not be recovered from the landlord (tenant for life of the reversion) under s. 42 of the Act, which cast the burthen upon "the owner of every such building, being the person entitled to the immediate possession thereof." "Though Pakenham's rent may have ceased," said Crompton, J., "his occupation continues. If there were crops on the premises, he might enter and take them. I concur in the opinion of the magistrate, and I think that the words in s. 42, 'being entitled to immediate possession,' were introduced expressly to meet a case of this kind." The judgment of the Court of Queen's Bench in *Mourilyan, app., Labalmondier, resp.*, is also decisive as to the party liable. Cockburn, C. J., there says: "I think the appellants are not the owners of the premises, within the meaning of ss. 72, 73, and are not therefore the parties primarily liable for these expenses. They have let the premises to Neill for a term of twenty-one years: and I think the appellants are right in contending, that, construing ss. 72, 73 according to s. 3, the interpretation clause, Neill is to be considered as the owner for purposes of the statute. He is, in the language of
 *25] *s. 3, 'in the occupation of the tenement other than as a tenant from year to year or for any less term, or as a tenant at will.' He certainly took possession of the premises, and continues in possession: and there is nothing to show that he does not occupy them, so far as premises of that kind can be occupied, or that there is any other occupier than he. He is therefore within the meaning of the word 'owner,' as defined by s. 3, and the order under s. 73 ought to have been directed to him." Crompton, J., says: "The question turns on the construction of s. 73, as explained by s. 3, the interpretation clause. Who is the statutable 'owner' upon whom the order under s. 73 is to be made? Section 3 enacts that 'owner shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will.' *It seems to me that the statute contemplated that where, as in this case, there is both a first owner, in receipt of the rents and profits, and a second statutable owner, by virtue of occupation for a longer term than from year to year, such last owner is to be the party liable for these expenses.* One strong ground for this view is, that no other party would have the right to enter the premises and pull down such part as was ruinous. *Neill is such second owner: and*

I therefore think that the order should have been directed to him, and not to the appellants." And Hill, J., expressed himself in similar terms. Is there a "statutable owner" here? Yes: the person in actual occupation; one of the persons residing on the premises. The defendant would have no right to go upon the premises and do the work. It never could have been the intention of the statute to give an election, as suggested on the other side. [BYLES, J.—A., the owner of *the fee, demises to B.; B. underleases to C.; and C. lets the premises to a tenant for a period longer than from year to year. [*26 Why should one of the three be preferred to the others?] That is not this case. The Court cannot discharge this rule, without overruling *Mourilyan, app., Labalmondiere, resp.* [MONTAGUE SMITH, J.—Against whom do you say the action should have been brought?] Against Collins, who had the largest interest in the premises; leaving him to resort to any others who might be liable to contribute. In the course of the argument of the case of *Mourilyan, app., Labalmondiere, resp.*, Wightman, J., is reported (in 30 Law J. M. C. 97) to have said: "I think s. 3 means that a lessee for twenty-one years should be the 'owner;' not that, where there is such a lease as we have here, there should be two persons in the position of 'owner,' the lessor and the lessee." And Cockburn, C. J., suggests this case,—“Suppose a lease granted, and several subsequent sub-leases, the last being for twenty-one years, do you say that an order could be obtained upon the former lessees or upon the lessor?” To which the counsel for the respondent answers,—“Yes: the object of the statute was, to give a double remedy; and it could not have been given more clearly.” Wightman, J., thereupon observes,—“Section 97 would seem to remove all difficulty.” [BYLES, J.—Section 97 certainly seems to be a very important section.(a)] That *section contemplates that each party benefited by the work shall contribute in proportion to the [*27

(a) “Where it is hereby declared that expenses are to be borne by the owner of any premises (including in the term ‘owner’ the adjoining and building-owner respectively), the following rules shall be observed with respect to the payment of such expenses:—

“(1.) The owner immediately entitled in possession to such premises, or the occupier thereof, shall in the first instance pay such expenses, with this limitation, that no occupier shall be liable to pay any sum not exceeding in amount the rent due or that will thereafter accrue due from him in respect of such premises during the period of his occupancy:

“(2.) If there are more owners than one, every owner shall be liable to contribute to such expenses in proportion to his interest:

“(3.) If any difference arises as to the amount of contribution, such difference shall be decided by arbitration, to be conducted in manner directed by the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); and for that purpose the clauses of the said act with respect to the settlement of disputes by arbitration shall be incorporated with this act:

“(4.) If some of the owners liable to contribution cannot be found, the deficiency so arising shall be divided amongst the parties that can be found:

“(5.) Any occupier of premises who has paid any expenses under this act may deduct the amount so paid from any rent payable by him to any owner of the same premises; and any owner of premises who has paid more than his due proportion of any expenses may deduct the amount so overpaid from any rent that may be payable by him to any other owner of the same premises:

“(6.) If default is made by any owner or occupier in payment of any expenses hereby made payable by him in the first instance, or if default is made by any owner in payment of any other expenses or moneys due from him by way of contribution or otherwise in pursuance of this act, then, in addition to any other remedies hereby provided, such expenses and moneys, if arising in respect of any matter within the provisions of the third part of this act, may be recovered as a debt due, in course of law, but, if arising in respect of any other matter under this act, may be recovered in a summary manner.”

advantage he derives from it. The present defendant derives no benefit from the rebuilding of this party-wall. [BYLES, J.—Did any part of this party-wall pass by the demise either to Collins or to Berridge, or were the demises to them mere demises of the rooms with the right of access thereto? Suppose a demise for eighteen months of a single room; would the tenant be an “owner” within the statute? Does it *28] not mean a person having *an estate or interest in the whole of the premises? Does it mean an estate in a room, or a closet?] It is submitted that the person to be charged under this statute must be in *possession*: he must be a person having *power* to do the repairs himself.

Then, as to the second point,—whether an *agreement* for a lease for seven years gives the tenant a greater interest than that of a tenant from year to year. *Stratton v. Pettit*, 16 C. B. 420 (E. C. L. R. vol. 81), is virtually overruled by *Tidey v. Mollett*, 16 C. B. N. S. 298 (E. C. L. R. vol. 111), where it was held that an instrument which is void as a *lease*, by reason of the provision in the 8 & 9 Vict. c. 106, s. 3, may nevertheless enure as an *agreement*. Byles, J., there says,—“There is only one point upon which I wish to make an observation, viz., the construction of instruments of this sort. It appears, that, first in the Queen’s Bench (in *Bond v. Rosling*, 1 Best & Smith 371), and then in the Exchequer (in *Rollason v. Leon*, 7 Hurlst. & N. 73), and afterwards in the Court of Chancery (in *Parker v. Taswell*, 27 Law J. Ch. 812), and also in this Court during the present term, in a case of *Hayne v. Cummings*, 16 C. B. N. S. 421 (E. C. L. R. vol. 111), the error which this Court fell into in *Stratton v. Pettit* has now been corrected; and it is settled, that, though void as a lease, by reason of the 8 & 9 Vict. c. 106, s. 3, not being by deed, these instruments may still be held good as agreements for a tenancy.” *Cowen v. Phillips*, 33 Beavan 18, is a strong authority to the same effect. By a memorandum of agreement, signed, but not under seal, one Baker agreed to let Cowen and Davis a shop and parlour on the ground-floor and two kitchens on the basement, being part of No. 3, Bruton Street, Bond Street,—the remainder of the house being in Baker’s own occupation. The defendants, who were the occupiers of the adjoining house, being desirous of rebuilding the party-wall between their pre-
 •29] mises and *No. 3, Bruton Street, gave notice under the act to Baker on the 18th of July, 1862. Baker not having appointed a surveyor to act for him, one was appointed for him by the defendants, under the act. The surveyors on the 2d of August made an award settling how the works were to be done, and awarding that they should “be commenced at once.” No notice was given by the defendants to the plaintiffs (Cowen and Davis); but, on the 21st of August, the defendants’ workmen commenced operations, and knocked holes through the party-wall, thus exposing the plaintiffs’ shop. The plaintiffs thereupon filed a bill praying an injunction. An interlocutory injunction having been granted, and the cause coming on for hearing, the Master of the Rolls said,—“I think the plaintiffs have a right to a decree. The real question is, whether the plaintiffs, as the adjoining owners, were entitled to receive any notice from the defendants. The plaintiffs have been in occupation under the agreement set forth in the bill, by which Mr. Baker, who had power to grant an

underlease, says, in consideration of 50*l.*, I hereby let you the shop, parlour, and kitchen, for three years, at the yearly rent of 105*l.* It is not under seal, and therefore, under the act, it is not a lease: but, although it is void as a lease, the question is whether it is not valid as an agreement. I have no doubt that it is a valid contract, and that this Court would specifically enforce it." It is clear, therefore, that an agreement (not under seal) for a tenancy for four years is a valid instrument at law as well as in equity, notwithstanding the statute prevents it from enuring in all respects according to the intention of the parties.

ERLE, C. J.—This is an action by the building owner against the adjoining owner to recover compensation due in respect of a party-wall. The wall in question *was found to be in a dangerous state, and was ordered by the commissioners of sewers, acting [*30 under the provisions of the Metropolitan Building Act, 1855, to be in part pulled down and rebuilt. For the purpose of the present rule, it must be taken that the plaintiffs had done all that was required by the statute to be done by them to entitle them to call upon Harris to pay his proportion of the expense incurred. It appears that Harris held the premises upon a long lease, probably at a ground-rent, and was making the usual profit by the improved rents, having let the second floor and attics on lease for twenty-one years to one Collins, the ground-floor and basement to one Berridge under an executory agreement for four years and a half, and the first floor we may assume to have been occupied by some person unknown, upon terms which did not appear. We may take it, according to the dictum of the Master of the Rolls in *Cowen v. Phillips*, 33 Beavan 18, that Berridge took an estate or interest under his agreement though ineffectual as a lease. Harris being the "owner" in receipt of the rents and profits in the way I have mentioned, the claim is made on him as such. It seems to me, on the plain words of the interpretation clause of the Metropolitan Building Act, 1855, that he is the adjoining owner, and therefore liable. That clause provides that "*owner* shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will." Harris is the person who is in receipt of the whole of the rents and profits, and in my opinion the "owner" within the meaning of that section. He contends that he is not the owner, because the premises are not in his immediate occupation, but in that of Collins and *Berridge and [*31 the unknown person before mentioned: Is that an answer to the plaintiff's action against Harris? As I read the statute, I think the action is properly brought against Harris. The 73d section is that which gives the building owner who has pulled down and rebuilt a dangerous structure a right to demand repayment of the expenses incurred: the words of the latter part of that section are,—"*and all expenses incurred by the said commissioners,*"—or by the building owner,—"*in respect of any dangerous structure by virtue of the second part of this Act, shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or*

other person liable to the expenses of repairs.”(a) It is clear that the
 *32] duty is cast upon the “owner,” as defined in s. 3,—a person
 having a beneficial lease, and receiving the improved rent; but
 it is to be without prejudice to his right to recover the amount from

(a) This 73d section applies to expenses incurred by the commissioners (of police or sewers) in the removal of “dangerous structures,” not to expenses incurred by a “building owner” in the repair of a defective “party-structure.” The words are, “If the owner or occupier to whom notice is given as last aforesaid” (notice under s. 72, that the structure is in a dangerous state, and that it must be taken down, secured, or repaired, as the case may require,) “fails to comply, as speedily as the nature of the case permits, with the requisition of such notice, the said commissioners may make complaint thereof before a justice of the peace; and it shall be lawful for such justice to order the owner, or, on his default, the occupier of any such structure, to take down, repair, or otherwise secure, to the satisfaction of the surveyor who made such survey as aforesaid, or of such other surveyor as the said commissioners may appoint, such structure or such part thereof as appears to him to be in a dangerous state, within a time to be fixed by such justice; and, in case the same is not taken down, repaired, or otherwise secured within the time so limited, the said commissioners may with all convenient speed cause all or so much of such structure as is in a dangerous condition to be taken down, repaired, or otherwise secured, in such manner as may be requisite: and all expenses incurred by the said commissioners in respect of any dangerous structure by virtue of the second part of this act, shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs.” This would seem to apply only to a dangerous dwelling-house or building.

The provisions as to party-walls are contained in parts of ss. 82, 83, 84, 85, and 88, and ss. 89, 90, and 91.

Section 82 provides, that, “in the construction of the following provisions relating to party-structures, such one of the owners of the premises separated by or adjoining to any party-structure as is desirous of executing any work in respect of such party-structure shall be called the *building-owner*, and the owner of the other premises shall be called the *adjoining-owner*.”

Section 83. “The building-owner shall have the following rights in relation to party-structures, that is to say (among others),—

“(1.) A right to make good or repair any party-structure that is defective or out of repair :

“(2.) A right to pull down and rebuild any party-structure that is so far defective or out of repair as to make it necessary or desirable to pull down the same.”

Section 84. “Whenever the building-owner purposes to exercise any of the foregoing rights with respect to party-structures, the adjoining-owner may require the building-owner to build on any such party-structure certain chimney-jamba, breasts, or flues, or certain piers or recesses, or any other like works for the convenience of such adjoining-owner; and it shall be the duty of the building-owner to comply with such requisition in all cases where the execution of the required works will not be injurious to the building-owner, or cause to him unnecessary inconvenience or unnecessary delay in the exercise of his right; and any difference that arises between any building-owner and adjoining-owner in respect of the execution of such works as aforesaid shall be determined in manner in which differences between building-owners and adjoining-owners are hereinafter (s. 85) directed to be determined.”

Section 85. “The following rules shall be observed with respect to the exercise by building-owners and adjoining-owners of their respective rights,”—amongst others,—

“(1.) No building-owner shall, except with the consent of the adjoining-owner, or in cases where any party-structure is dangerous, in which cases the provisions hereby made as to dangerous structures (Part II.) shall apply, exercise any right hereby given in respect of any party-structure, unless he has given at the least three months’ previous notice to the adjoining-owner, by delivering the same to him personally or by sending it by post in a registered letter addressed to such owner at his last known place of abode :

“(2.) The notice so given shall be in writing or printed, and shall state the nature of the proposed work, and the time at which such work is proposed to be commenced :

“(4.) Upon the receipt of such notice, the adjoining-owner may require the building-owner to build, or may himself build on any such party-structure any works to the construction of which he is hereinbefore (s. 84) mentioned to be entitled.”

Then follow provisions for what shall be done in case of differences arising between the parties.

Section 88. “The following rules shall be observed as to expenses in respect of any party-structure, that is to say (amongst others),—

“As to expenses to be borne jointly by the building-owner and adjoining-owner,—

“(1.) If any party-structure is defective or out of repair, the expense of making good or

any person who by contract with him is bound to do the repairs. The owner of a long term is *supposed to have paid a premium [*33 for his interest, and to recoup himself out of the larger sum which he receives for the improved rent. That seems to me to be a strong argument to show that in this case Harris is the person primarily liable to pay these expenses. *There is a manifest convenience in allowing the building owner to have recourse to the [*34 person who like this defendant receives the whole of the rents and profits of the premises, so that he may have one certain *owner [*35 from whom one payment may be claimed, instead of the inconvenience of having to call upon several sub-lessees or tenants, of whose arrangements with their lessor he can have no knowledge. In the present case one of the tenants has a term of four years and a half only: it would be manifest injustice to make him pay the expense of the party-wall adjoining his floor. I think the statute contemplated the adjoining-owner for this purpose as being one having a permanent interest in the premises to be benefited by the work, because the 84th section provides that, "whenever the building-owner purposes to exercise any of the foregoing rights,"—the rights given to him by s. 83,—"with respect to any party-structure, the adjoining-owner may require the building-owner to build on any such party-structure certain chimney-jambs, breasts, or flues, or certain piers or recesses, or any other like works, for the convenience of the adjoining-owner; and it shall be the duty of the building-owner to comply with such requisition in all cases where the execution of the required works will not be injurious to the building-owner, or cause to him unnecessary inconvenience or unnecessary delay in the exercise of his right." It would seem to be more reasonable to give that right to an owner hav-

repairing the same shall be borne by the building-owner and adjoining-owner in due proportion, regard being had to the use that each owner makes of such structure:

"(2.) If any party-structure is pulled down and rebuilt, by reason of its being so far defective or out of repair as to make it necessary or desirable to pull down the same, the expense of such pulling down and rebuilding shall be borne by the building-owner and adjoining-owner in due proportion, regard being had to the use that each owner makes of such structure."

Section 89. "Within one month after the completion of any work which any building-owner is by this act authorized or required to execute, and the expense of which is in whole or in part to be borne by an adjoining-owner, such building-owner shall deliver to the adjoining owner an account in writing of the expense of the work, specifying any deduction to which such adjoining-owner or other person may be entitled in respect of old materials or in other respects; and every such work as aforesaid shall be estimated and valued at fair average rates and prices according to the nature of the work and the locality, and the market-price of materials and labour at the time."

Section 90. "At any time within one month after the delivery of such account, the adjoining-owner, if dissatisfied therewith, may declare his dissatisfaction to the party delivering the same, by notice in writing given by himself or his agent, and specifying his objections thereto; and upon such notice having been given a difference shall be deemed to have arisen between the parties, and such difference shall be determined in manner hereinbefore (s. 85) provided for the determination of differences between building and adjoining owners."

Section 91. "If within such period of one month as aforesaid the party receiving such account does not declare in manner aforesaid his dissatisfaction therewith, he shall be deemed to have accepted the same, and shall pay the same, on demand, to the party delivering the account, and, if he fails to do so, the amount so due may be recovered as a debt."

This last is the only provision in the act giving the building-owner a right of action against the adjoining-owner.

The provisions for contribution and recovery thereof are contained in s. 97, referred to ante, p. 26.

ing a permanent interest in the premises, than to give it to the occupier of each separate floor, who might require different lines of flues, &c. The person pointed at evidently is a lessee for a long term, who is in receipt of the rents and profits of the whole premises. This construction is supported by the language of the 97th section, which provides, that, where it is by the Act declared that expenses are to be borne by the owner of any premises (including in the term "owner" the adjoining and building-owner respectively), the following rules *36] shall be observed with respect to the payment of such *expenses,—amongst others,—1. "The owner immediately entitled in possession to such premises, or the occupier thereof, shall in the first instance pay such expenses, with this limitation, that no occupier shall be liable to pay any sum exceeding in amount the rent due or that will thereafter accrue due from him in respect of such premises during the period of his tenancy." 2. "If there are more owners than one, every owner shall be liable to contribute to such expenses during the period of his occupancy." 4. "If some of the owners liable to contribution cannot be found, the deficiency so arising shall be divided amongst the parties that can be found." The "owner immediately entitled in possession to such premises," *prima facie* imports the tenant in fee in possession: but we are referred back to the definition of "owner" in s. 3,—"every person in possession or receipt either of the whole or of any part of the rents or profits of the land or tenement," in contradistinction to the occupier living on the premises. If in this case Harris could not be found, or was unable to pay, and the plaintiffs, as building-owners, had gone against Collins and Berridge, their remedy against each of them would be limited to the amount of the rent due or that would thereafter accrue due from him in respect of such premises during the period of his occupancy. Some confirmation is given to this view by the 74th section, which enacts, that, "if such owner cannot be found, or if, on demand, he refuses or neglects to pay the aforesaid expenses, the said Commissioners, after giving three months' notice of their intention to do so, by posting a printed or written notice in a conspicuous place on the structure in respect of which or of part of which they have incurred expense, or on the land whereon it stands, *may sell such structure*, and they shall, after deduct- *37] ing from the proceeds of such sale *the amount of all expenses incurred by them, restore the surplus (if any) to the owner." What that means I do not pretend to say. But, when the time comes for a building-owner to exercise such a right, it will behoove him to be very wary, and not to attempt to sell more than the interest of the person in default. I do not go into that: but I must say it would be a very strange thing if the interest of the owner of the fee could be sold in consequence of the default of a sub-lessee who, as here, may have an interest extending only to four or five years. According to the best interpretation I can put upon the statute, the building-owner has a right to call upon the person who holds the entire premises for a long term, and is substantially in possession of all the rents and profits. I not mean to say that the owner of the fee-simple may not also be liable. But I can see my way clearly to the conclusion that the owner of a long term, who is in receipt of the rents and profits, is liable.

The cases which have been adverted to do not throw much light upon the subject. In *Evelyn, app., Whichcord, resp., Ellis, B. & E. 126* (E. C. L. R. vol. 96), Evelyn, the owner of the fee, had let the land in question to one Searle for eighty-one years, at a peppercorn-rent for the first year, 6*l.* for the second year, and 12*l.* per annum for the remainder of the term; Searle covenanting to build six houses on the land. Whichcord, the district-surveyor,—Searle having built the houses, and then become bankrupt without having paid the surveyor's fees, under the 51st section of the act, which entitles the surveyor to recover the amount of fees due to him from "the builder employed in erecting such building, or in doing such work, or in doing any matter in respect of which any special service has been performed by the surveyor, or from *the owner* or occupier of the building so erected or in respect of which such work *has been done [*38 or service performed,"—claimed those fees from the appellant, as owner of the fee. The judgment of the Court was, that the owner of the fee simple was not "owner" within the definition given in s. 3, because, as Crompton, J., says, he was neither in possession of the rents and profits, nor in the occupation of the premises. "He is not," said Lord Campbell, "an owner within the definition in s. 3. Certainly he is not occupier: and he can be charged as owner only in respect of his being in receipt of part of the rents and profits: but it seems to me that he is not in such receipt within the meaning of the clause. No rent really comes to him: he has only a peppercorn-rent, but receives no profits. We could not hold him liable, unless everybody who grants a building-lease is to be liable to the surveyor, in respect of his ultimate reversion. To impose such a liability would be oppressive and unjust, and entirely unnecessary." I am reported to have said, that, under the peculiar circumstances of that case, I read the statute as my Lord did. What I meant was, that the fee in question was a fee which the builder was bound to pay to the district-surveyor, and that the surveyor had no right to wait until the builder had become bankrupt, and then come upon the owner of the fee, whose interest was only that of a reversioner. It was clear to my mind that it was the duty of the Court to consider well before they shifted the burden from the builder to the owner of the fee, who had no immediate interest in the matter. So stands that judgment. The question there had nothing whatever to do with rights and liabilities created by proximity between the building-owner and the adjoining-owner in respect of a party-wall. It was an original liability as between the district-surveyor and the builder. The same observation applies to the case of *Mourilyan, app., Labalmondiere, resp., 1 Ellis * & Ellis 533* (E. C. L. R. vol. 102). There, a chapel had been [*39 let by the appellant on lease for twenty-one years to one Neill; Neill covenanting to keep the premises in repair. No question arose there as to the relative rights of building and adjoining-owner. The commissioners of police, finding upon a survey that the structure was in a dangerous state, caused a notice to be affixed to the building, addressed to the owner and occupier, requiring them to take down the west wall and otherwise render secure the said structure. A complaint was afterwards made to a magistrate, and an order obtained directing the owner and occupier to do what was necessary. This

order not having been obeyed, it became the duty of the commissioners to do the necessary work themselves, which they did, and subsequently obtained an order upon the appellant to pay the expenses. Upon appeal, the Court of Queen's Bench came to the conclusion that Mourilyan, the owner of the fee, was not the person who ought to have been proceeded against in the first instance under the 73d section of the act; there being an intermediate lessee or person entitled to the rents and profits, to whom recourse should have been had. Neill (who probably received pew-rents) was held to be the person liable to be called upon, for the same reason that I say Harris here was the person liable, as being the person in receipt of the rents and profits. There will be no inconvenience in holding that Harris is liable to be called upon to pay the whole: he may have recourse for contribution to his lessees or under-tenants who have covenanted with him to keep the premises in repair. I do not think we shall be contravening any of the decided cases in holding that the plaintiffs are entitled to recover.

BYLES, J.—My Lord having gone so fully into the matter, it will
 *40] only be necessary for me, in expressing *my concurrence, to add a very few words. I cannot conceive that any doubt can now remain. The cases of Mourilyan, app., Labalmondiere, resp., 1 Ellis & Ellis 533 (E. C. L. R. vol. 96), Evelyn, app., Whichcord, resp., Ellis, B. & E. 126 (E. C. L. R. vol. 102), and Cowen v. Phillips, 33 Beavan 18, were all rightly decided. In the first of those cases it was decided that one who held the premises on lease for twenty-one years, with a covenant to repair, was the party liable, and, further, that he was the *only* person liable, and that the lessee might have his remedy for contribution. It is unnecessary to discuss the reasons why I come to the conclusion that there is no ground for impeaching the soundness of that decision. In Evelyn, app., Whichcord, resp., it was held that an owner in fee-simple who lets the land on a building-lease at a peppercorn-rent, is not liable as owner for the district-surveyor's fee. In Cowen v. Phillips, the effect of the decision is, that, though, in point of law, a person holding under such an agreement as existed there, may be only a tenant from year to year, yet, in a court of equity, if he has a contract for a longer term, he must be held to have a greater interest than that of tenant from year to year, because a Court of equity assumes that to be done which is contracted to be done. The statute must receive the same construction in a Court of equity as in a Court of law. All those cases are consistent with our decision here. This is an action by the building-owner against the adjoining-owner for contribution to the expense of repairing the party-wall. *Primâ facie* they are companions in ownership. They may be joint-tenants of the party-wall, or they may be tenants in common, or each may be the owner of one side of it, or of different portions of it in the case of parallel freeholds,—the ground-floor to one, and the upper floors to another. But one thing
 *41] is plain, viz. that this defendant is "owner" within the *meaning of the term as fixed and defined by the act of parliament. It seems to me that he is more than that,—that he is occupier. It appears that the ground-floor and basement were demised to one tenant, the second and third floors to a second, and the first floor was

assumed also to be let to some person unknown. What is there to show that these several demises carried any portion of the party-wall? If they do, the mere letting of lodgings or a single room might do so likewise. It seems to me that in this case the defendant is owner, and, as far as I can see, the occupying-owner, and that there is nothing to show that any one else is. I do not find that he has demised any portion of the party-wall. A., taking rooms from B., would certainly be very much surprised if he were told it included a demise of a portion of the party-wall. I entirely agree with my Lord and I cannot entertain any doubt.

KEATING, J., was engaged in another court.

MONTAGUE SMITH, J.—I am of the same opinion. It may be difficult to put a definite construction upon this act of parliament. We must deal with each case as the occasion arises. For the reasons already given, I think this defendant answers the description of "owner" given in the interpretation-clause. He is the beneficial owner of the whole premises,—receiving the rents and profits of the whole. I am not satisfied by the evidence that there is any other person who answers that description. It may be that there are others who are liable to him for contribution. But, finding the defendant to be a person clearly answering the description of "owner," and seeing no other person who does so, I see no reason for disturbing the verdict. I also entirely agree that the 97th section of the act *materially assists the construction in favour of the maintenance [*42 of the present action. As to the second point, I agree with the decision of the Master of the Rolls in *Cowen v. Phillips*, 33 Beavan 18. If the question had turned upon that, probably Mr. Hoggins's able argument would have been well founded. On the first point argued by Mr. Coleridge, the plaintiffs are entitled to keep their verdict.

Rule discharged.

The law of the several states respecting the liability for repairs to party-walls and partition-fences seems substantially the same, with few exceptions, on the question where such liability is cast, whether on the owner of the freehold, or on a holder of a less estate; and it is thought that, except as in the statutes of Ohio, where lessees are referred to (1 Rev. Stat. 648), the former would only be held bound; owner or occupant, 1 Stat. of Illinois 590; owner or possessor, Stat. of Minnesota 223; Act of Assembly, (fences) Penna. 1721, and owner, Penna., *Purd. Dig.* 777 (party-walls); 2 Rev. Stat. New York 1002; Stat. of Missis. 203; Indiana, 1 Stat. 343, are words intended to describe, it is thought, a more enduring estate than that of a lessee for a short term, (leases for long terms not being yet generally used in the United States), since to throw such a burden on the lessee instead of the landlord, whose property is permanently benefited by the repairs, seems to be inequitable. See generally as to party-walls, 3 Kent Com. 436, *Bouvier's Law Dict.*

LANGLEY v. HEADLAND. *April 27.*

It is competent to a plaintiff to discharge the defendant from custody under a ca. sa., notwithstanding the claim of his attorney for the costs of the action are unsatisfied, and, by reason of the plaintiff's being an infant, are likely to remain so.

THE plaintiff, who was an officer in the army, and not yet of full age, though he appeared to have represented to his attorney that he had attained his majority, sued the defendant for a sum of 180*l.* which he had intrusted to him for the purpose of paying an over-due bill, but which the defendant had not so applied, and recovered a judgment against him for the debt and 47*l.* 8*s.* 6*d.* costs, for which the defendant was taken in execution.

Whilst the defendant was in Whitecross Street prison, the father of the plaintiff, hearing that his son's affairs were very much involved, came to London and instructed his attorney, Mr. Wren, to endeavour to arrange them, and for this purpose Mr. Wren put himself in communication with the plaintiff's attorney, Mr. Wallinger. Mr. Wren was also in communication with the defendant, with a view to his discharge from custody upon terms: but of this no notice was given to Mr. Wallinger.

On the 12th of April, Wren wrote to the defendant,—“Your last *43] letter to Mr. H. Langley has been *submitted to me by his father. If you hand over a duplicate for a diamond pin and diamond ear-rings pawned for 15*l.*, and get delivered up to me the four bills for 500*l.*, 500*l.*, 200*l.*, and 200*l.*, I am authorized to give you your discharge.”

The defendant's attorney on the same day called on Wren, and explained to him the defendant's inability to procure the whole of the bills mentioned in Wren's letter, but offered to hand over the duplicate for the diamond pin and ear-rings, and one of the bills for 500*l.* To this Wren assented, and an appointment was made for the following day, when the defendant's attorney handed over to Wren the duplicate and bill, and received from him the following document:—

“In the Common Pleas.

“Henry William Langley, plaintiff.

“Henry Headland, defendant.

“I hereby consent that the above defendant be discharged from the custody of the sheriffs of London, and request you to take the necessary steps to effect his discharge.

“HENRY WILLIAM LANGLEY,
the above-named plaintiff.

“Witness, W. W. Wren.

“19th April, 1865.

“To Mr. Wallinger, plaintiff's attorney.”

This authority for the defendant's discharge was handed to Mr. Wallinger by the defendant's attorney on the 21st of April. That gentleman, however, declined to take any step in the matter, assigning his reasons in the following letter of the same date, addressed to the defendant's attorney,—

“I consider that your client is not entitled to his discharge until my lien on the judgment for the costs has been satisfied. The costs due amount to 47*l.* 8*s.* 6*d.* I do not think that this attempt to juggle

me out of my legitimate costs will receive the support and countenance of the court."

*A summons was thereupon taken out at Chambers calling upon Mr. Wallinger to show cause why the defendant should [*44 not be forthwith discharged out of custody in this action. The matter was referred to the court.

Mellor now moved for a rule in the same terms.—He submitted, that, in the absence of collusion between the parties, for which there was no pretence here, the plaintiff's attorney had no lien on the body of the defendant for his costs, and consequently no power to keep him in custody against the wish of the plaintiff. "The defendant cannot be detained if the plaintiff is satisfied:" per curiam, in *Martin v. Francia*, 2 B. & Ald. 402. In *Marr v. Smith*, 4 B. & Ald. 466 (E. C. L. R. vol. 6), the plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record; and it was held that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied. Similar doctrine results from the case of *Barker v. St. Quintin*, 12 M. & W. 441. Parke, B., there says: "The lien which an attorney is said to have on a judgment (which is perhaps an incorrect expression), is merely a claim to the equitable interference of the court to have that judgment held as a security for his debt."

Bridge showed cause in the first instance, upon an affidavit setting forth all the circumstances, and stating that the plaintiff, who was still a minor, was considerably indebted to Wallinger, and that, unless his lien on the judgment against the defendant for the costs of this action were retained and enforced, he would be in great danger of losing them. He submitted that the plaintiff's attorney could not be called upon to defeat *his own claim to costs by discharging the [*45 defendant from custody, that the summons did not call upon the plaintiff to show cause, and that the plaintiff's letter was addressed to his attorney, and not to the sheriff.

After some discussion, the court proposed that the plaintiff's order for the defendant's discharge from custody should be handed over to *Mellor*, and that there should be no rule. This was assented to, and the order was handed over accordingly.

The order having been produced to the sheriffs of London, and they having declined to act upon it, on the ground that it was not directed to them,

Mellor on a subsequent day (May 1st) obtained a rule to show cause why the defendant should not be forthwith discharged out of the custody of the sheriffs in this action; and by the direction of the court the rule was served upon the plaintiff and upon Mr. Wallinger, but the court intimating at the same time that Mr. Wallinger need not appear unless he thought proper. The plaintiff did not appear to show cause; but

Bridge appeared on behalf of Wallinger, who submitted that his rights would be prejudiced by the defendant's discharge, and that he, as attorney for the plaintiff on the record, was entitled to appear.(a)

(a) In *Camp v. Pota*, 8 C. B. 375 (E. C. L. R. vol. 65), the attorney for the plaintiff was allowed to oppose the defendant's release. There, the defendant was taken in execution upon

[BYLES, J.—Is not *Barker v. St. Quintin*, 12 M. & W. 441, conclusive
 *46] to show that the sheriff is bound to *discharge the defendant
 out of custody upon the direction of the plaintiff in the action?] That case was considered in *Ex parte Games*, *In re Williams v. Lloyd*, 8 Hurlst. & Colt. 294. There, a plaintiff who had obtained judgment for his costs, in collusion with the defendant, and in order to defeat the lien of the plaintiff's attorney, gave him and the sheriff notice not to execute any process, on pain of being treated as trespassers; and the court held that a judge had power, in the exercise of the equitable jurisdiction of the court, to order the plaintiff *or the defendant* to pay the attorney the costs. "I think," said Pollock, C. B., "that the court is bound to see that justice is done; and that they are not prevented from exercising their equitable interference in this manner, because no express authority has been cited in support of it. No doubt, in general, the court cannot, upon motion, order one man to pay over money to another, unless the former be an officer of the court, and the money was received by him in that character. But the court has entire control over the proceedings in a cause; and, notwithstanding judgment has been signed, they may, in the exercise of their equitable jurisdiction, set aside a release, or make any order consistent with the practice and procedure of the court, so as to suppress collusion and fraud." [BYLES, J.—If this question had arisen on a *fi. fa.*, no doubt your argument would be correct. But the rule laid down in *Barker v. St. Quintin* is, that the attorney cannot authorize the sheriff to arrest or detain the defendant on a *ca. sa.*, if
 *47] the plaintiff in the action *consents to his discharge. Here, the plaintiff has consented, and he does not now appear to show cause against this rule. The rule seems to be, that the court will not hold a defendant in custody merely for the purpose of enforcing the attorney's claim for costs. Suppose the plaintiff had appeared and said "I consent to the defendant's discharge," would we not be bound to act upon it? And, is not that what he does in effect say by his absence?] In *Marr v. Smith*, 4 B. & Ald. 466, satisfaction had been entered on the roll: the court were therefore bound to order the defendant's discharge. Here is but an agreement, which the court is called upon by virtue of its equitable jurisdiction to enforce. The court will not do that in defeasance of the equitable claim of the plaintiff's attorney.(a)

Mellor, in support of his rule.—In the absence of collusion,—and none is suggested here,—the Court will not enable the attorney to keep the defendant in custody for costs for which he has his remedy against his client, the plaintiff. [KEATING, J.—The order for the discharge of the defendant is addressed to the plaintiff's attorney instead of to the sheriffs, and therefore the sheriffs declined to act upon it, without the authority of the Court. What is there to prevent

a *ca. sa.* at the suit of the plaintiff, in June, 1841; in August in the same year, the plaintiff left England, and was shortly afterwards seen at St. Petersburg, but had never been heard of since. Upon an affidavit of these facts, and showing reasonable ground to induce them to believe that the plaintiff was dead, and alleging that proper search had been made, and no trace of a will or grant of administration found,—the court (in 1849) ordered the defendant to be discharged from custody, without regard to any supposed lien of the attorney for costs.

(a) See the cases collected in 1 Ch. Archb. 136 et seq., 11th edit. See also Lush's Practice 224, 2d edit.

the defendant from procuring from the plaintiff another order addressed to the sheriffs?] Having got all he could from the defendant, he refuses to give another order. The law is clear as to the right of the plaintiff to order the defendant's discharge: *Marr v. Smith*, 4 B. & Ald. 466 (E. C. L. R. vol. 6); *Barker v. St. Quintin*, 12 M. & W. 441. In *Marr v. Smith*, Holroyd, J., says: "The plaintiff's attorney has no lien on the person of the defendant. As soon as judgment is obtained, his power is at an end also. *It is true that he has a lien for [*48 his costs, and that the court will assist him to make the subject-matter recovered by the judgment available for that purpose: but they will go no further." In *Jordan v. Hunt*, 3 Dowl. P. C. 666, it was held that an attorney is not justified in proceeding with an action after it has been settled between the parties themselves, though it is known that costs have been incurred, and that the plaintiff himself is not in a condition to pay them: it must be shown affirmatively that the settlement was come to for the purpose of cheating the attorney. Parke, B., treats the matter as beyond doubt. The case of a defendant in custody under a ca. sa. is altogether different from that of process under which the plaintiff's attorney may obtain some fruits. In the former case, the defendant is entitled to the benefit of the discharge, even though it be the result of collusion between the parties.

BYLES, J.(a)—This rule in substance calls upon the plaintiff to show cause why the defendant should not be discharged out of the custody of the sheriffs of London. The plaintiff does not appear: but the Court, on granting the rule, directed that notice should be given to the plaintiff's attorney, who has a claim for the costs of the action, lest injustice should be done. We must assume that the plaintiff consents to the rule being made absolute: and I do not see how he could have refused to consent. He signed an authority for the release of the defendant, directed to his own attorney; and the defendant has paid the consideration agreed upon, by restoring an acceptance of the plaintiff's for 500*l.* and a duplicate for a diamond pin and ear-rings. The order of discharge so signed by the plaintiff has *been [*49 handed to the plaintiff's attorney, in order that he might cause the defendant to be released, according to the plaintiff's intention. The attorney, however, declines to do anything upon it, because his costs are unpaid, and the plaintiff in this action being an infant, there is little prospect that they ever will be paid. On a former occasion, the Court declined to compel the attorney to take any step towards procuring the defendant's release from custody; but, at their suggestion, the plaintiff's order for that purpose was handed over to the defendant. Upon that order being presented to the sheriffs, they very properly declined to act upon it, inasmuch as it was not addressed to them; and they desire to have the authority of the Court before they discharge the defendant. The plaintiff's attorney has been heard in opposition to the rule. His claim of lien, as it is called, does not seem to have presented itself to the mind of Mr. Wren when he obtained the plaintiff's signature to the document. I do not think the defendant ought to be prejudiced by that. The plaintiff is bound to do what he bargained for. The simple question is, whether, when the plaintiff desires to discharge the defendant from custody under

(a) Erle, C. J., and Montague Smith, J., were attending the Court of Criminal Appeal.

the *ca. sa.*, the attorney's lien for costs is any answer. The authorities referred to show that it is not. I therefore think this rule should be made absolute, upon the terms of the defendant undertaking not to bring any action either against the sheriffs or against any other person for or by reason of his having been detained in custody at the suit of the plaintiff in the said action, and without prejudice to any remedy the plaintiff's attorney may have upon the judgment obtained in this cause.

KEATING, J.—I am of the same opinion, though I must confess the
 *50] arguments urged on the part of the *plaintiff's attorney for some time induced me to entertain some doubts as to how far the equitable jurisdiction of the Court might under the circumstances be involved. When this matter was before the Court in the earlier part of the term, and they directed that the order of discharge should be restored to the defendant, though they did not thereby bind themselves to give any particular effect to it, they did at the same time give a sort of intimation that the plaintiff was bound by the bargain made on his behalf and with his assent by Mr. Wren. I think under the circumstances we are justified in treating the document, coupled with his non-appearance to-day to object, as a consent on the part of the plaintiff that the defendant shall be released from custody. Upon the conditions, therefore, which have been mentioned by my Brother Byles, I agree with him that this rule should be made absolute.

Rule absolute.

In the following term, *Bridge*, on behalf of Wallinger, moved for a rule calling upon the plaintiff and his father and his father's attorney (Wren) to show cause why the diamond pin and ear-rings should not be given up to Wallinger in part satisfaction of his lien for the costs of the action. It appeared that Wren had offered to give them up, on Wallinger's paying him 22*l.* 15*s.* 3*d.*, the sum which he had paid in order to redeem them; but, inasmuch as Wren had paid that sum after notice of Wallinger's lien, the latter declined to pay it.

WILLES, J.—You are coming to invoke the aid of the equitable jurisdiction of the Court in your favour. You must therefore do equity.

The rest of the Court concurring,

Rule refused.

*51] *ROBINSON v. THE LONDON AND SOUTH WESTERN RAILWAY COMPANY. May 1.

1. By the 7th section of the Railway Traffic Act, 17 & 18 Vict. c. 31, a railway company is not liable for loss of or injury to a horse on the railway, beyond the value of 50*l.*, unless the sender shall at the time of delivering it to the company to be carried have declared it to be of a higher value, in which case the company are empowered to charge a reasonable percentage for the increased risk and care thereby occasioned:—Held, that the declaration of value must be such as to convey a distinct intimation to the company that the sender intends to hold them responsible for the higher sum.

2. Where, therefore, a servant of a railway company, having casually learned that a mare tendered for carriage was worth 155*l.*, refused to carry her unless insurance-money was paid beyond the usual charge for carriage:—Held, that the company were responsible for such refusal.

3. *Semble*, that the declaration of value need not be made at the moment of tendering the animal to be carried.

THIS was an action against the London and South Western Railway Company for refusing to carry a mare belonging to the plaintiff.

The first count of the declaration stated, that, at the times thereafter referred to, the defendants were common carriers of horses by railway from their Liss station to their Waterloo station, London; that, before any of the said times, the defendants made and published certain conditions upon which alone they declared that they would receive, forward, and deliver horses, which conditions had not at any of the said times been rescinded or altered, and which conditions were so published as aforesaid, and were contained in a certain printed notice by the defendants published, which notice was as follows:—

“Notice as to horses, cattle, &c. The London and South Western Railway Company hereby give notice that they will receive, forward, and deliver horses, &c., solely on and subject to the following conditions:—The company will not be responsible for any loss or injury to any horse, &c., in the receiving, forwarding, or delivering, if such damage be occasioned by the kicking, plunging, or unruliness of the same. Declaration as to the conveyance of horses, cattle, &c. In pursuance of an act (17 & 18 Vict. c. 31), intituled, &c., it is provided in clause 7, in reference to the liability of railway and canal companies for loss or injury done to any horse, cattle, or other animals, that no greater damage shall be *recovered for the loss of or for [*52 any injury done to such animals, beyond the sums hereinafter mentioned, that is to say,—for any horse, 50*l.*, &c., &c., unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be of respectively higher value than as above mentioned, in which case it shall be lawful for such company to demand and receive, by way of compensation for the increased risk and care thereby occasioned a reasonable percentage upon the excess of the value so declared, above the sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge. Notice is therefore hereby given, that, from and after the date hereof, a percentage of 5*l.* per cent. will be charged, in addition to the usual charge for conveyance, by the London and South Western Railway, upon any excess in the declared value of horses, cattle, or other animals, over and above the amount fixed by the act aforesaid, viz., for any horse, 50*l.*, &c. And notice is hereby given that all declarations of the value of horses or other animals, where such value exceeds the above sums respectively, must be signed by the owner thereof, or by his agent, before they can be received by the company for transmission by the railway.” Averment, that the plaintiff, at a reasonable and proper time in that behalf, tendered to the defendants, at their Liss station aforesaid, a mare, to be by them carried from their Liss station aforesaid to their Waterloo station aforesaid, and there delivered for the plaintiff, according to the defendants’ duty in that behalf, under the circumstances aforesaid, for hire to the defendants in that behalf, and requested the defendants to receive, carry, and deliver the said mare as aforesaid, and did not declare or intend to declare the said mare to be of any higher value than 50*l.*; that the plaintiff was then ready and willing and offered to *pay to the [*53 defendants their reasonable hire in that behalf, whereof the defendants then had notice; and that the defendants then had sufficient

time, means, and convenience to receive, carry, and deliver the said mare as aforesaid, and could and ought to have done so: Breach, that the defendants did not nor would receive, carry, and deliver the said mare for the plaintiff: special damage.

The fourth plea stated, that, before and at the time of the tender and delivery of the said mare as alleged, the person sending the same had declared the said mare to be of higher value than 50*l.*, that is to say, of the value of 135*l.*, whereupon the defendants, under and by virtue of the said act mentioned in the said notice, demanded of the person so tendering the said mare as aforesaid, by way of compensation for the increased risk and care occasioned by the said higher value, a percentage of 5*l.* per cent. in addition to the usual charges for conveyance upon the excess of the declared value of the said mare over and above the said sum of 50*l.*, being the amount limited by the act aforesaid, the said percentage being a reasonable percentage upon the excess of the value so declared above the said sum so limited as aforesaid; that the person tendering the said mare as aforesaid refused to pay to the defendants the said percentage, wherefore the defendants refused to receive and carry the said mare, as they lawfully might for the cause aforesaid; and that such percentage or increased rate of charge was notified in the manner prescribed in the statute 11 G. 4 & 1 W. 4, c. 68.

The plaintiff joined issue upon the above and other pleas.

The cause was tried before Erle, C. J., at the sittings in London after last Michaelmas Term. The facts which appeared in evidence *54] were as follows:—One *Ayling, who resided at Liss, in the county of Hants, having a mare to dispose of, the plaintiff commissioned a friend (Captain Mainwaring) to go to Liss to examine her. On his return to London, Captain Mainwaring, having communicated to the plaintiff his opinion of the animal, at his request telegraphed to Ayling at Liss, inquiring if he would take 135*l.* for her. In answer to this, Ayling telegraphed to Captain Mainwaring, "I will take 135*l.* for the mare, and will warrant her sound." A few days afterwards Captain Mainwaring wrote to Ayling requesting him to forward the mare by rail to London; and Ayling, who received this letter on the 31st of December, 1863, called on Wade, the station-master at Liss, and requested him to have a horse-box ready on the 2d of January. It appeared that it was part of Wade's duty, as station-master, to work the telegraph; and, meeting Ayling on the 1st of January, he asked him if the horse he was about to send was the animal in reference to which the telegrams had passed; being told that it was, Wade said, that, as he was aware that the value of the mare was 135*l.*, he would not receive her unless he was paid insurance for the extra risk; and he demanded 17*s.* 6*d.* for the carriage of the mare, and 4*l.* 5*s.* for insurance. On the same day, Ayling received a letter from Wade embodying what he had told him, which letter he forwarded to Captain Mainwaring.

Captain Mainwaring had in the meantime written to inspector Norwood, at the Waterloo station (to whom he was known), requesting him to send a careful man down to Liss to bring up a valuable mare: and, on receipt of Ayling's letter, he again wrote to Norwood as follows:—

"London, 4th January, 1864.

"Sir,—I am sorry to trouble you so much; but the receipt this morning of the two enclosed has placed me *in a fix, and I should be much obliged to you to give instructions to your station-master and to the man who goes down to fetch the mare from Liss. But the mare may be sent (by the man) to-morrow, as directed in my letter to you of yesterday, without insuring her, the expense being so great: and I must observe that I never heard of a case where a station-master has refused to load a horse unless insured. If, however, the man who goes for the mare finds that she is dangerous in the train, or if he finds that she has been in before and anything has happened to her through her own vice, then I think she ought to be insured, but not otherwise. Mr. Ayling, the man I have bought her of, told me she had never been in a train in her life. I have had horses of 300*l.* or 400*l.* value often by train, with nobody with them. I never insured a horse in my life, and never had an accident with one. It appears to me that your station-master at Liss is exceeding his powers. *The value of this animal is 135*l.**" [*55]

No person was sent down by the company: and, on the 6th of January, Captain Mainwaring received a letter from the office of the superintendent at the Waterloo station, informing him that Mr. Scott, the traffic-manager, had informed Ayling of the terms on which the mare would be conveyed, and that a horse-box had been sent to Liss, but the horse had not been sent up.

A horse-box was sent down to Liss on the 14th of January, and Captain Mainwaring tendered the mare, offering to pay the ordinary charge for her conveyance to London; but the station-master refused to receive her. Captain Mainwaring then inquired of the station-master whether, if he paid the insurance-money, he would receive and forward the mare; upon which Wade said that he could not forward her that day. *Captain Mainwaring thereupon gave Wade a written notice that he would leave the mare at Ayling's at the company's risk and expense. [*56]

On the 16th of January, Mr. Scott, the defendants' traffic-manager, wrote to Captain Mainwaring, stating that, when notice was first given that the mare would be brought to Liss station, her value was declared to be 135*l.*, which justified the station-master's demand; and asking whether he (the captain) desired to have the mare conveyed at his risk, subject only to the liability of the company for the conveyance of an ordinary animal the value of which was not declared, and whether the previously declared value was withdrawn, adding, that, if so, he would at once order the mare to be received and conveyed from Liss to London. No answer was sent to this letter.

On the part of the defendants, it was submitted that the admission to the station-master at Liss, and Captain Mainwaring's letter of the 4th of January, 1864, amounted to a declaration of value within the meaning of the 7th section of the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31,(a) and justified the *refusal of the company to carry the mare unless she was insured. [*57]

(a) Which enacts that "every such company as aforesaid shall be liable for the loss of or injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such com-

For the plaintiffs it was insisted that the fair construction of the letter relied on, was, that the sender declined to insure; and that neither the mention of the value at the end of the letter nor the admission made to the station-master at Liss constituted a declaration of value within the statute.

His Lordship left it to the jury to say whether there had been a refusal on the part of the company to carry the mare uninsured, and whether the sum demanded by them for insurance (if the demand was under the circumstances justifiable) was a reasonable sum.

The jury answered both questions in the affirmative, and a verdict was entered for the plaintiff, which by arrangement was to be for 5*l*., with all proper certificates, subject to leave reserved to the defendants to move for a verdict or a nonsuit.

Ballantine, Serjt., accordingly, in Hilary Term last, obtained a rule nisi to enter a verdict for the defendants, on the grounds,—first, that there was no offer to pay extra for insurance,—secondly, that there was a declaration within the act.

Denman, Q. C., and *Kingdon*, now showed cause.—The real question is, whether there was such a declaration by or on behalf of the owner of the mare of *her value as to entitle the defendants to *58] refuse to carry her unless insured. [ERLE, C. J.—Or whether the company were under any obligation to pay the 135*l*. if the mare had been carried by them and injured on the journey.] Under the 17 & 18 Vict. c. 31, the company's right to demand an extra sum for increased risk does not arise until the sender has declared the animal to be of a higher value than 50*l*. The information as to the value of this mare which the station-master at Liss had acquired by means of the telegrams clearly has nothing to do with the case. And Captain Mainwaring, acting for the plaintiff, throughout insisted upon his right to exercise his option to declare the value or not. The casual mention of the value of the mare in the letter of the 4th of January was not a declaration. To fix the company with liability, the declaration of value must be clear and distinct. In *Boys v. Pink*, 8 Car. & P. 361 (E. C. L. R. vol. 34), it was held that the notice under the Carriers Act, 11 G. 4 & 1 W. 4, c. 68, must be an express and formal declaration of the value: mere knowledge on the part of the carrier would not do. The like was held in *Hart v. Baxendale*, 6 Exch. 769. In *Peck v. The North Staffordshire Railway Company*, 32 Law J., Q. B. 241, the question was, whether the conditions imposed by the company were just and reasonable. What passed between the agent of the owner of the marbles and the company was neither intended by him nor received by them as a declaration of their value. [ERLE,

pany or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability: any such notice, condition, or declaration being hereby declared to be null and void:" "Provided always that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned, that is to say, for any horse 50*l*.," &c.; "unless the person sending or delivering the same to such company shall at the time of such delivery have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge."

C. J., intimated that this question had been raised in the Queen's Bench with reference to the carriage of a dog.] That was a case of *Harrison v. The London, Brighton, and South Coast Railway Company*, 2 Best & Smith 122 (E. C. L. R. vol. 110). [ERLE, C. J.—That is not the case I meant to refer to.] The position assumed by the station-master here was clearly untenable.

**Ballantine*, Serjt., and *Wood*, in support of the rule.—If there [*59 has been a declaration of the value of the animal, the intention of the party sending it is wholly immaterial. Suppose this had been an action against the Company for injury occasioned to the mare in the transit, could they in the face of the correspondence have contended for a moment that there had been no declaration of value? The important letter is that of the 4th of January, in which Captain Mainwaring, the plaintiff's agent, distinctly says, "The value of this animal is 135l." Setting aside the knowledge which Wade, the station-master at Liss, derived from the telegraphic communications, that letter amounts to a distinct declaration of the animal's value within the statute. Wightman, J., in delivering the judgment of the Exchequer Chamber in *The Great Northern Railway Company, app., Behrens, resp.*, 7 Hurlst. & N. 950, says: "We think that the respondent having declared the value of the picture to the carman, who was the agent of the appellants, and who received the same to be carried by them, was entitled, upon the loss of it by the appellants, to recover its value, though he did not pay or offer to pay any increased rate in proportion to the value, no such payment having been required either at the time of delivery to the carman or at any other time before the loss. The case of *Hart v. Baxendale*, 6 Exch. 769, decides, that, in such a case as the present, the person delivering the goods to the carrier must, in the first instance, declare their value, in order to fix the carrier with responsibility, and the carrier may then require him to pay an increased rate of charge according to a tariff put up in the office; but there is nothing in the statute which protects him from liability, if, after the value is declared to be such as would entitle him to demand an increased rate of charge, he chooses to accept the goods to be carried, *without making any demand of such [*60 increased rate, or requiring it to be either paid or promised. The carrier is not bound to accept such goods for carriage without payment of such increased rate, if required; but, if he choose to do so, and the value is declared, he will not be protected by the Act." That is a distinct authority to show that the defendants here were justified in refusing to carry the plaintiff's mare uninsured. [MONTAGUE SMITH, J.—The Court there assumed that there was a good declaration of the value.] The declaration of value here was never withdrawn. The letter of the traffic-manager, of the 16th of January, shows that. [MONTAGUE SMITH, J.—That letter was written after the company's officer had refused to forward the horse without payment of an increased charge by way of insurance.]

ERLE, C. J.—I am of opinion that this rule should be discharged. The question is, whether the defendants have rendered themselves liable to an action for refusing to carry the plaintiff's mare from Liss to London, without being paid a sum for insurance beyond the charge for the carriage. It appears that they, by their servants, did so refuse,

because the sender of the mare had (as they say) declared that the value of the animal exceeded 50*l*. The question turns upon whether or not there was evidence that the sender did declare the value to be above 50*l*.; for, unless there was such a declaration communicated to the Company, they had no right to demand a sum for insurance. The 7th section of the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, for the protection of the Company, enacts that no greater sum than 50*l*. shall be recovered against them for the loss of, or for any injury done to any horse, &c., "unless the person sending or delivering the *61] same to such Company shall at the time of such *delivery have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such Company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable per-centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge." Knowledge of the value of the animal not derived from the declaration of the sender cannot give the Company a right to demand the increased rate. The evidence here shows that the Company made the claim because the station-master at Liss, who had been just before employed in communicating messages between the plaintiff and Mr. Ayling, the former owner of the mare, with reference to the sale of her by the latter to the former, had casually learned that the mare was of the value of 135*l*. It is clear that that was no declaration by the sender. The strength of the defendants' case, if any, lay in Captain Mainwaring's letter to Inspector Norwood of the 4th of January, 1864. In that letter, the captain writes to request that the mare may be sent without insuring her. "If, however," he goes on, "the man who goes for the mare finds that she is dangerous in the train, or if he finds she has been in before and anything has happened to her through her own vice, then I think she ought to be insured, but not otherwise." And at the end he says "The value of the animal is 135*l*." Taking the whole of the letter together, in my judgment it amounts to this,— "I do not intend to insure the mare unless I am obliged: and in that case I mention her value." I see nothing that amounts to a declaration such as was contemplated by the statute,— "I require you to carry my mare, and to guarantee her safe delivery *62] in London, and I declare her value to be *135*l*." If such a declaration as that had been made, it would have created a liability on the part of the Company to make good the loss of or any injury to the animal, and on the sender to pay the additional price which was to insure him that guarantee. If the letter of the traffic-manager, of the 16th of January, had been written immediately after Captain Mainwaring's letter of the 4th, and before the demand of the 13th, and the writer had said,— "We do not understand what has passed between you and our station-master at Liss. Do you intend to have your mare carried as a valuable animal, or as an ordinary uninsured animal?" and the sender did not make it clear that he did not intend her to go at the Company's risk for the higher value, I think the defendants would have been justified in demanding insurance. But that letter came too late. Upon the whole, I am of opinion that there

was no such declaration of value as to entitle the defendants to refuse to carry the mare as an uninsured animal.

BYLES, J.—I am of the same opinion. The two acts of parliament,—the Carriers Act, 11 G. 4 & 1 W. 4, c. 68, and the Railway Traffic Act, 17 & 18 Vict. c. 81,—are in *pari materiâ*, and must receive the same construction. The language is substantially the same in both. Each requires a declaration of the value, a declaration which must come from the sender, and which must be so express as to be understood by the carrier as a declaration of value, so as to constitute a contract between them. It is plain, in the events which have happened here, that what passed between the agent of the owner of the mare and the servants of the Company, viz. the statement that the value of the animal was 135*l.*, was neither intended nor understood as a declaration of her value within the statute. The case of *Behrens v. The Great Northern Railway Company*, 6 Hurlst. & N. 366, [*63] is no authority in favour of the defendants here, because the pictures were delivered by the plaintiff to the Company's carman, who gave a receipt for them in this form,—“Received of I. B. Behrens 1 case, containing two large valuable oil-paintings, directed, with great care, to Mr. L. Stover, Turk's Head Hotel, Grey Street, Newcastle-upon-Tyne. Per Great Northern Railway. Declared over the value of 110*l.*” That was a distinct declaration of the value which would have entitled the Company to make an increased charge for the extra risk. For these reasons, I am of opinion that the plaintiff is entitled to recover.

MONTAGUE SMITH, J.—I am of the same opinion. I think there was no such declaration of value within the meaning of the statute as to entitle the company to the higher freight for carrying the plaintiff's mare. I agree that the declaration must be made with an intention that it shall operate as a distinct intimation to the company that they are called upon to exercise such an extra degree of care in the conveyance of the animal as to entitle them to charge the higher sum authorized by the statute. But the evidence discloses no such intentional declaration on the part of the sender of the mare. The station-master at Liss had no more right to assume the value of the animal from the messages which had passed through his hands during the treaty of purchase between the plaintiff and Ayling, than if he had learned her value by overhearing a conversation between them in the street. Then, in writing to Inspector Norwood, Captain Mainwaring is writing to him very much in the character of his own agent. “The mare,” he says, “may be sent to-morrow, as directed in my letter to you of yesterday, without insuring her, the expense being so great. If *however, the man who goes for the mare finds that she is dan- [*64] gerous in the train, or if he finds she has been in before and anything has happened to her through her own vice,(a) then I think she ought to be insured, but not otherwise.” Thus the person who is to determine whether or not the mare shall be insured, is, the man who is to be sent down to take charge of her in the train. At the

(a) In the case of injury to the animal through her own vice, the insurance would seem to be no protection; for, the company's notice expressly declares that they will not be responsible “for any loss or injury to any horse, &c., in the receiving, forwarding, or delivering, if such damage be occasioned by the kicking, plunging, or unruliness of the same.”

end, the writer says "The value of this animal is 135*l*." That is, if, in the exercise of his discretion, the person so sent to take charge of her thinks she ought to be insured, that is the price at which she is valued. This clearly was not intended, and could not have been understood, as a declaration of value within the Traffic Act. For these reasons, I am of opinion that the verdict for the plaintiff must stand for the sum agreed on.

KEATING, J.—I have not heard the whole of the argument: but, so far as I have heard, I concur in the judgment of the rest of the Court.
Rule accordingly.

*65] *THE REV. W. WALKER, Clerk, v. BROGDEN. *May 5.*

1. In an action for a libel contained in two letters published in a newspaper, the defendant pleaded, by way of justification, that the second letter (which in itself contained a distinct substantive libel) was a fair comment upon the facts stated in the first letter:—Held bad.

2. To say of a clergyman that he came to the performance of Divine Service in a towering passion, and that his conduct was calculated to make infidels of his congregation, is libellous.

THIS was an action for a libel.

The declaration stated, that the defendant falsely and maliciously printed and published of the plaintiff, and of him as vicar of Bardney, which he then was, in a public newspaper called the "Lincoln Gazette," the words following, that is to say:—"Bardney. To the Editor. On Sunday morning last, accompanied by a few friends who were visiting with me, I attended our parish church. When I entered, there were only some eight or ten persons present; and, after having got comfortably seated, I saw our worthy Divine (meaning the plaintiff) escorting the school-mistress of Southrey up the aisle. After passing some twenty empty pews, his reverence (meaning the plaintiff) halted at the one he had appropriated to my use in consequence of some dispute which had occurred twelve months ago. I immediately arose, and requested him to show the lady into another pew, explaining to him that there were plenty of empty pews, and that, had we another introduced into our pew, we should be inconveniently full. 'Shure,' says he (meaning the plaintiff), 'get in now; ye'll get in here,'—at the same time giving me a slight push. I remonstrated with him (meaning the plaintiff), telling him not to assault me in the church. 'Shure,' says he (meaning the plaintiff), 'I'll assault ye immediately.' I, not wishing for any disturbance with the gentleman (meaning the plaintiff), retired; but, before I had got three yards from the pew, he (meaning the plaintiff) had laid his hands upon one young lady, and pushed her completely out of one particular corner, although there was ample room where I had been sitting, after

*66] I had left the pew. So thoroughly disgusted was I with his (meaning the plaintiff's) ungentlemanly and ridiculous conduct, that I left the church, as also did my friends. Surely there is some law to prevent such conduct to a churchwarden, or I shall use my best endeavours to obtain a sufficient sum of money to present him with something if he will resign, or at any rate make a tour and endeavour to find another specimen of humanity like unto himself; as it is a pity two places should be troubled with such a man. Let him

(meaning the plaintiff) remain until we send for him again. JOHN R. MALTBY." "To the Editor. Our vicar (meaning the plaintiff) has committed a slight mistake in turning our churchwarden out of his pew last Sunday morning. I may be wrong: but I think he (meaning the plaintiff) did. I can hardly reconcile his practice with his profession. He (meaning the plaintiff) professes to be a follower of 'the great Example,' and a successor of his Apostles in a direct line: but I think there must have been a link broken in the chain which connects our divine (meaning the plaintiff) with an apostle. He (meaning the plaintiff) professes to be moved by the Holy Ghost to preach the Gospel; and there can be no doubt that he (meaning the plaintiff) was moved by 'the Spirit' when he came to the churchwarden, and turned him out of his place in a towering passion. Strange preparation for that solemn service!! Is not the inconsistent conduct of the professed followers of Christ enough to make infidels of us all? The Church in all ages has suffered most from her professed friends. What is the use of a bishop, if he cannot stop the vagaries of a divine? CHURCHWARDEN." Claim 500*l*.

The defendant pleaded,—first, not guilty,—secondly, to the first count,(a) down to and inclusive of the words and letter "John R. Maltby," that, before he *(the defendant) did what is therein [*67 complained of, namely, on the Sunday morning in the said libel mentioned, to wit, Sunday, the 19th of June, 1864, one John R. Maltby, accompanied by a few friends who were visiting him, attended his parish church, being the church of the parish of Bardney, whereof the plaintiff then was and yet is vicar, and whereof the said Maltby then was churchwarden, as the plaintiff then well knew; and that, when the said Maltby entered, there were only some eight or ten persons present; and that, after having got comfortably seated, the said Maltby saw the plaintiff escorting the school-mistress of Southrey up the aisle; and that, after passing some twenty empty pews, the plaintiff halted at the one he had appropriated to the said Maltby, in consequence of a dispute which had occurred some twelve months before the said time when, &c.; and that the said Maltby immediately rose, and requested the plaintiff to show the lady into another pew, explaining to the plaintiff that there were plenty of empty pews, and further explaining to the plaintiff, that, had the said Maltby and his said friends another person introduced into their pew, they would be inconveniently full; and that thereupon the plaintiff addressed to the said lady the words following, that is to say, "Shure, get in now; ye'll get in here," and at the same time gave the said Maltby a slight push; and that the said Maltby remonstrated with the plaintiff, telling him not to assault him the said Maltby in the church; and that thereupon the plaintiff addressed to the said Maltby the words following, that is to say, "Shure, I'll assault ye immediately;" and that the said Maltby, not wishing for any disturbance with the plaintiff, retired; and that, before the said Maltby had got three yards from the pew, the plaintiff laid his hands upon a young lady, and pushed her completely out of one particular *corner in the said pew in which [*68 the said Maltby had been seated as aforesaid, although there was ample room where the said Maltby had been sitting, after the

(a) The declaration was not so divided.

said Maltby left the pew; and that the said Maltby was so thoroughly disgusted with the plaintiff's aforesaid conduct, which the defendant alleges to have been ungentlemanly and ridiculous conduct, that the said Maltby left the church, as also did the said Maltby's said friends; and that the said Maltby was, and his said friends were, desirous of having the plaintiff cease to be vicar of Bardney,—Thirdly, as to so much of the declaration as is not pleaded to in the next preceding plea, that the words which are mentioned in so much of the declaration as is herein pleaded to, were and are printed and published in the said newspaper in the declaration mentioned, in a distinct paragraph from the words to which the next preceding plea is pleaded; and that the said words were and are a fair and bonâ fide comment upon the several matters and premises contained and referred to in the words hereinbefore pleaded to, and upon the conduct of the plaintiff as and being such vicar as in the declaration mentioned, and were printed and published by the defendant as and for such comment, and without any malicious intent or motive whatever.

The plaintiff demurred to the second and third pleas, the grounds of demurrer stated in the margin being,—as to the second plea, "that it does not justify the part of the libel to which it is pleaded as a justification,"—and, as to the third plea, "that the alleged comment can only be justified by conduct of which this plea does not allege that the plaintiff is guilty." Joinder.

*69] *Simon*, Serjt., in support of the demurrer.(a)—The *second plea professes to justify so much of the libel as relates to what passed in the church on the occasion in question: it professes to answer the whole, and in reality only answers part. The question, therefore, is, whether the words not covered by the plea may be considered as a fair inference from the passages justified. The whole letter is libellous: it contains opprobrious and insulting remarks upon the conduct of the plaintiff as a clergyman and a gentleman. In *Mountney v. Watton*, 2 B. & Ad. 673, the declaration stated that the defendant, intending to cause it to be believed that the plaintiff was guilty of feloniously stealing a horse, published a libel concerning him. The libel, as set out, was headed "Horse-stealer," and then alleged that the plaintiff was taken up on suspicion of having stolen a horse, by a constable who was informed that "such a character" was at a certain public-house: it then went on to state circumstances of suspicion against the plaintiff, and ultimately that, having obtained permission to go out of the constable's sight, he made his escape, but was retaken, and confined in gaol for examination: innuendo, that the plaintiff was guilty of feloniously stealing a horse. The defendant pleaded the general issue, and then a justification as to all parts of the libel except the word "horse-stealer," setting out in this latter plea the several circumstances related in the libel. It was held, that, as the declaration alleged that the libel was intended to convey a charge of felony, and this intent was not denied by the plea, the statement of circumstances of suspicion to excuse part of the libel, was not sufficient justification. Lord Tenterden, in giving judgment, said: "I am of opinion that this plea is not sufficient. The declaration

(a) The points marked for argument on the part of the plaintiff were those stated in the margin of the demurrer.

states that the defendant published a libel with intent to cause it to be believed that the plaintiff had been guilty of feloniously stealing *a horse. If the words of the alleged libel did not amount to a charge of felony, the defendant, on a trial, would have succeeded upon the general issue, and without any justification. But if the words declared upon do impute an actual felony, as the declaration charges, then a justification merely setting out that the plaintiff was, on certain grounds, suspected of stealing, cannot be any answer. I do not, however, mean to lay it down, that, where an alleged libel is divisible, one part may not be justified separately from the rest, if a proper justification can be made out." Nothing can justify the vituperative remarks contained in the first letter here. [BYLES, J.—In *Mountney v. Watton*, the libel imputed felony: the justification set out circumstances of suspicion only.] In *Clarke v. Taylor*, 2 N. C. 654, 665, 3 Scott 95, Tindal, C. J., says: "There can be no doubt that a man may justify part only of a libel containing several distinct charges. That was established in *Stiles v. Nokes*, 7 East 493. But, if he omits to justify a part which contains libellous matter, he is liable in damages for that which he has so omitted to justify. So, in *Cooper v. Lawson*, 8 Ad. & E. 746 (E. C. L. R. vol. 35), 1 P. & D. 15, a libel stated that the plaintiff, a tradesman in London, became surety for the petitioner on the Berwick election petition, and stated himself, on oath, to be sufficiently qualified in point of property, when he was not in fact qualified, nor able to pay his debts. It then asked why the plaintiff, being unconnected with the borough, should take so much trouble, and incur such an exposure of his embarrassments; and proceeded, "*There can be but one answer to these very natural and reasonable queries; he is hired for the occasion.*" The defendant justified, stating that the above-mentioned allegations in the libel (except the hiring, which was not specifically noticed) were true, and that the *publication was a correct report of proceedings in a legal court, "*together with a fair and bonâ fide commentary thereon.*" [*71] It was held that this concluding observation in the libel, not being a mere inference from the previous statement, but introducing a substantive fact, required a distinct justification; and therefore, that, on the trial of an issue on *de injuriâ*, it was properly left to the jury to say, not only whether the evidence made out the facts first alleged, but also whether the imputation that the plaintiff had been hired, was a fair comment. The jury having found that it was not, a new trial was refused. [MONTAGUE SMITH, J.—The question here is, whether the observations complained of, and not justified, are more than a fair inference from the previous statements.]

Then, as to the third plea,—a similar plea was held bad, and disallowed in *The Earl of Lucan v. Smith*, 1 Hurlst. & N. 481, 26 L. J., Exch. 94. Pollock, C. B., there said: "Whatever evidence would be admissible under the proposed plea, may be given under the general issue and a plea simply stating that the article was a fair comment." And Bramwell, B., said: "I think it is important to the defendants that this application should be refused; for, if it were necessary to allege by plea the facts which it is said make the article complained of a fair comment, it would be necessary to prove the truth of those facts in the report of the commissioners. That, how-

ever, is not necessary, if the object be merely to show that the article is a fair comment." [BYLES, J.—Does not the third plea incorporate the words to which the second is pleaded?] It is submitted not.

Sir *G. Honyman* (with whom was *Field*, Q. C.), *contra*.(a)—As to *72] the second plea, there seems to be *nothing to answer. [ERLE, C. J.—We are all agreed as to that.] The third plea is good. As to the case of *The Earl of Lucan v. Smith*, 1 Hurlst. & N. 481, which is relied on for the plaintiff, all it amounts to is this, that, in an action for a libel, the Court refused to allow the defendant to plead a plea setting out facts to show that the alleged libel was a fair comment,—saying that it amounted to the general issue. The demurrer here admits that the matter pleaded to is a fair comment. [BYLES, J.—If it can be a fair comment.] It is suggested that the plea does not in terms aver the truth of the matters. It clearly, however, does by implication. The first part of the libel is a statement of the plaintiff's conduct: the rest is a comment on what has gone before. [MONTAGUE SMITH, J.—It is confined by the introduction to so much of the declaration as is not pleaded to in the second plea.] If necessary, the Court will, under the 222d section of the Common Law Procedure Act, 1852, allow the defendant to amend, by pleading it as one plea to the whole declaration.

Simon, Serjt., was heard in reply.

*73] *ERLE, C. J.—The plaintiff in his declaration complains of the publication by the defendant of a libel upon him as vicar of the parish church of Bardney. The libel is contained in two letters, one signed "John R. Maltby," the other "Churchman," each of which letters was published by the defendant in the same newspaper. The first of these letters in effect charges that the plaintiff, being vicar of the parish church of Bardney, assaulted the churchwarden in the church, and turned his family out of his pew in an ungentlemanly and ridiculous manner. The second letter reiterates the charge of turning the churchwarden out of his pew, and makes certain comments on the plaintiff's alleged conduct. The second plea is pleaded to the letter signed "John R. Maltby," and asserts the truth of all the statements contained therein, but omits to justify the concluding part of that letter,—“Surely there is some law to prevent such conduct to a churchwarden, or I shall use my best endeavours to obtain a sufficient sum of money to present him with something if he will resign, or at any rate make a tour and endeavour to find another specimen of humanity like unto himself; as it is a pity two places should be troubled with such a man.” I am at a loss to see what there is there to justify, or how it can be called part of the libel. I think the

(a) The points marked for argument on the part of the defendant were as follows:—

“1. That the second plea is good, as it justifies all that it professes to justify: and, whether it does so or not, depends on a comparison of the contents of the libel with the averments in the plea:

“2. That the words in the libel are not to be construed as used ironically, without an innuendo to that effect; and therefore such an expression as ‘worthy Divine,’ is not to be understood as imputing unworthiness, but as a simple allegation that the plaintiff is in truth a worthy Divine:

“3. That the third plea is good, on the ground that substantially it denies malice:

“4. That the plea is sanctioned by the authority of *The Earl of Lucan v. Smith*, 1 Hurlst. & N. 481, 26 Law J., Exch. 94.

“5. That it amounts to the plea of not guilty, and as such is substantially good.”

second plea good. The third plea is pleaded to the second letter, signed "Churchman," and alleges that the words pleaded to "were and are a fair and bonâ fide comment upon the several matters and premises contained and referred to in the words hereinbefore pleaded to, and upon the conduct of the plaintiff as and being such vicar as in the declaration mentioned, and were printed and published by the defendant as and for such comment, and without any malicious intent or motive whatever." The plea is extremely obscure in this respect; I am *unable to say what is meant by a "fair and bonâ fide comment upon the several matters and premises contained and referred to in the words hereinbefore pleaded to." I think the plea is bad. It is entirely untenable for a newspaper proprietor to publish a letter, and in the same paper to publish another letter from another correspondent, and then say that the second letter is a fair and bonâ fide comment on the facts alleged in the first letter (as I assume the plea to mean). It seems to me that the second letter contains a distinct substantive libel. "He (the plaintiff) professes to be moved by the Holy Ghost to preach the Gospel: and there can be no doubt that he was moved by 'the Spirit' when he came to the churchwarden and turned him out of his place in a towering passion. Strange preparation for that solemn service!! Is not the inconsistent conduct of the professed followers of Christ enough to make infidels of us all?" To say that the plaintiff was moved by *the Spirit* might mean that he was the worse for liquor. The jury, it seems, have negatived that.^(a) From the suggestion that the *plaintiff was in a "towering passion," the writer may have meant to insinuate that he was moved by the spirit of wrath. To say of a clergyman that he came to the performance of Divine Service in a towering passion, and that his conduct was calculated to make infidels of his congregation, clearly is libellous. Being a libel per se, that letter cannot be justifiable as being a fair and bonâ fide comment on the matter contained in the preceding letter. For these reasons, I have arrived at the conclusion that the second plea is good, and the third bad.

BYLES, J.—I quite agree with my Lord as to the second plea: I think enough of the libel is justified. Whether, if the facts set out in the second plea had been repeated in the third plea, and then the plea had gone on to allege that the matter therein pleaded to was a fair and bonâ fide comment on the former matter, it would have been a good plea or not, I abstain from saying. It is enough to say that I agree in the conclusion to which the Lord Chief Justice has come.

KEATING, J., concurred.

^(a) The cause was tried before Martin, B., at the last spring assizes at Lincoln, when the jury returned a verdict for the defendant.

Hayes, Serjt., on a former day in this Term, obtained a rule nisi for a new trial, on the ground of misdirection. The misdirection complained of was, that the learned Baron told the jury that in his opinion the allegations in the libel and in the pleas, that Maltby was churchwarden (which in fact he was not), and that he had a right to the pew in question (which in fact he had not), were altogether unimportant and immaterial, and that the only substantial charge and question in the case was, whether the plaintiff had assaulted two persons in the church.

Cause was shown against this rule in Trinity Term, 1865, and in the result the rule was discharged.

On the motion, the case of *Helsham v. Blackwood*, 11 C. B. 111 (E. C. L. R. vol. 73), and the statute 32 G. 3, c. 60, were referred to.

MONTAGUE SMITH, J.—I am of opinion that the second plea is good, for the reasons already given. That which is left unjustified of the first letter is no more than fair comment on the facts alleged. The third plea is pleaded to a separate and independent letter, which contains substantive allegations of fact which are libellous, and which are left unjustified. Upon the same ground on which we hold the second plea to be good, we must hold the third bad.

Judgment for the plaintiff on the demurrer to the third plea,
and for the defendant on the demurrer to the second plea.

*76] *BOALER and Another v. JOSEPH MAYOR the Elder,
and JOSEPH MAYOR the Younger. May 8.

1. To operate a merger of a simple-contract debt in a specialty, the specialty must be co-extensive with the simple-contract debt, and between the same parties.

2. A transaction which would otherwise operate as a release of a surety,—such as, giving time to the principal debtor,—will not have that effect, either at law or in equity, if the remedy against the surety is expressly reserved.

THIS was an action by the payees against the makers of a joint and several promissory note. The declaration stated, that, on the 7th of December, 1864, the defendants by their promissory note, then overdue, promised to pay to the plaintiffs, on demand, 150*l.*, *with interest thereon at 4*l.* 10*s.* per annum* during the forbearance, but did not pay the same. Claim, 200*l.*

Pleas,—first, that the defendants did not make the note, as alleged,—secondly, payment,—thirdly, that the defendants made the note jointly with one Charles Mayor, and that, after making the said note, and before action, the said Charles Mayor satisfied the note, and the plaintiffs' claim thereon, by executing a deed whereby he secured to them and covenanted with the plaintiffs to pay them 650*l.* and interest, including the amount of the said note in account, and in satisfaction and discharge of the said note; which deed was executed by the said Charles Mayor at the request of the plaintiff, in full satisfaction and discharge of the plaintiffs' claim on the note; and that the plaintiffs' claim was thereby merged, extinguished, satisfied, and discharged,—fourthly, for a defence on equitable grounds, that the note was made by the defendants jointly with Charles Mayor, as surety to the plaintiffs for the said Charles Mayor, and in consideration of 150*l.* advanced by the plaintiff to the said Charles Mayor, whereof the plaintiffs had notice before and when they first received the said note, and they received and always held the same on the terms that the defendants should be liable to them on the said note as sureties only for the said Charles Mayor; *and that, after the making of the said note,
*77] and before action brought, the plaintiffs, without the consent of the defendants or either of them, for a good, valuable, and sufficient consideration in that behalf, agreed with the said Charles Mayor to give, and then gave him time for payment of the moneys in the said note specified, and thereby discharged the defendants from the said note.

Upon these pleas the plaintiffs joined issue.

The cause was tried before Erle, C. J., at the sittings at Guildhall after last Hilary Term. The facts were as follows:—The defendant Mayor the elder was in year 1863 carrying on the business of a green-grocer in Oxford Street, London; and, being desirous of retiring, agreed to dispose of the lease and good-will to his son Charles Mayor. Charles Mayor had no money of his own wherewith to embark in the business; but his wife had an interest in certain property under the will of her late father, over which she would on attaining the age of twenty-five have a power of appointment to the extent of a moiety in favour of her husband. Charles Mayor thereupon applied to an attorney named Whall, at Worksop, to raise 650*l.* for him upon this contingent interest. Whall endeavoured to procure the money from an insurance-office, but they declined to advance more than 500*l.* upon the proposed security, and to secure this they required besides a mortgage of the wife's interest and insurance on her life, or (as that turned out not to be insurable) that of her husband. Whall then induced the plaintiffs to advance the sum required, out of a fund which they held as executors of one Roper: but he required, in addition to the mortgage of the wife's interest in the property, and an assignment of the policy on Charles Mayor's life, the further security of a promissory note for 150*l.* with two sureties. According *to the evidence of Watson, one of the plaintiffs (which the jury [*78 believed), it was arranged that this note should be given as a collateral security. Accordingly, on the 7th of December, 1863, the note declared on was signed by Charles Mayor and the two defendants, his father and brother; and the 150*l.* was immediately advanced to Charles Mayor. And on the 22d of December a deed was executed between Charles Mayor and his wife of the first part, one Warren of the second part, and the plaintiffs of the third part. This deed recited the will of the wife's father, describing the interest she took under it, the policy on the life of Charles Mayor, that the plaintiffs had agreed to advance 650*l.* to Charles Mayor and his wife upon having an assignment (subject to redemption) of the wife's interest and a deposit of the policy, and that, for the better securing the 650*l.* and interest, Charles Mayor, and Warren as his surety, had agreed to enter into certain covenants thereafter contained: and it was witnessed, that, in consideration of 650*l.* paid by the parties of the third part to Charles Mayor and his wife, it was covenanted that the wife, on attaining the age of twenty-five, should exercise her power of appointment in favour of her husband. The deed also contained powers of sale, and a covenant by Charles Mayor and Warren for repayment of the 650*l.*, *with interest at 5 per cent.*, on the 22d of June, 1864.

After the execution of this deed, Charles Mayor was adjudicated a bankrupt on his own petition; and, on the 9th of December, 1864, this action was brought.

On the part of the defendants it was submitted that the plaintiffs' claim in respect of the promissory note merged in the deed; and that, as the day of payment of the 650*l.* was by the deed postponed till the 22d of June, 1864, that was a giving of time to the principal debtor which discharged the sureties.

*A verdict having under his Lordship's direction been found [*79 for the defendants, with leave to move,

Huddleston, Q. C., on a former day in this term obtained a rule nisi to enter a verdict for the plaintiffs for the amount of the note and interest, on the ground that the evidence did not prove the defendants' pleas, that the note was not merged in the deed, and that the defendants were not discharged by the time given by the deed to the principal debtor. He submitted, that, to operate a merger, the specialty must be co-extensive with the simple-contract debt, and between the same parties: *Ansell v. Baker*, 15 Q. B. 20 (E. C. L. R. vol. 69); *Sharpe v. Gibbs*, 16 C. B. N. S. 527 (E. C. L. R. vol. 109); and that, as it was proved to have been part of the arrangement for the advance of the 650*l.*, that the promissory note should be given as a collateral security, the sureties were not discharged by the time given by the deed,—the case being brought within the rule laid down in *Byles on Bills*, 8th edit. 233, where it is said that "It has been repeatedly held, and is now well established, that a giving of time by the creditor to the principal debtor will not discharge the surety, if there be an agreement between the creditor and the principal that the surety shall not be thereby discharged, although the surety himself be no party to the stipulation, or even have no notice of it;" for which the learned author cites *Burke's Case*, 6 Ves. 809; *Boulton v. Stubbs*, 18 Ves. 20; *Ex parte Glendinning*, Buck 517; *Ex parte Carstairs*, Buck 560; *Harrison v. Courtauld*, 3 B. & Ad. 36 (E. C. L. R. vol. 23); *Nichols v. Norris*, 3 B. & Ad. 41, n.; *Cowper v. Smith*, 4 M. & W. 519; *Smith v. Winter*, 4 M. & W. 454; *North v. Wakefield*, 13 Q. B. 536 (E. C. L. R. vol. 66); *Owen v. Homan*, 4 House of Lords Cases, 997, and *Webb v. Hewitt*, 3 K. & J. 438.

*80] *Macaulay*, Q. C., and *Cave*, now showed cause.—The *note was given as a temporary security for the 150*l.* advanced to Charles Mayor before the deed could be prepared. [ERLE, C. J.—Watson swore it was given as a collateral security; and the jury believed him.] *Ansell v. Baker* and *Sharpe v. Gibbs* are altogether inapplicable here. In the former, there could be no merger except as to Lake; and, in the latter, the deed was not executed by one of the parties. In *Price v. Moulton*, 10 C. B. 561 (E. C. L. R. vol. 70), it was held that a bond or covenant given to secure an existing debt, irrespectively of the intention of the parties, operates in law as a merger of the remedy on the simple contract. "The policy of the law," says Maule, J., "is, that there shall not be two subsisting remedies, one upon the covenant, and another upon the simple contract, by the same person against the same person for the same demand." In *King v. Hoare*, 13 M. & W. 494, it was held that a judgment (without satisfaction) recovered against one of two *joint* debtors, is a bar to an action against the other; and for this reliance was placed on the judgment of Maule, J., in *Bell v. Banks*, 3 M. & G. 258 (E. C. L. R. vol. 42), 3 Scott N. R. 497. Then, the effect of the deed was to give time to the principal debtor until the 22d of June, 1864. [BYLES, J.—Would a court of equity have allowed the creditors to pursue their remedy on the note against the principal debtor before the 22d of June, 1864?] It is submitted not. In *Boulton v. Stubbs*, 18 Ves. 20, a creditor having among other securities a bond with a surety, took a mortgage from the principal debtor, and agreed to receive the residue by instalments secured by warrant, &c., without

prejudice to any security he already held; and the Lord Chancellor granted an injunction against suing the surety. Assuming that Charles Mayor might have been sued upon the note, the effect of the deed still would be to give time to the principal debtor. Where parties have *entered into a deed, the deed is the only evidence [*81 of the transaction. In *Ex parte Glendinning*, Buck 517, it was held, that, if a creditor execute a deed of compromise with the principal debtor, he thereby discharges the surety,—unless it is stipulated in the deed that the remedies against the sureties shall be reserved; and that parol evidence of the understanding of the parties to the deed that the remedies against the surety shall be reserved, cannot be admitted. The like was held in *Lewis v. Jones*, 4 B. & C. 506 (E. C. L. R. vol. 10), 6 D. & R. 567 (E. C. L. R. vol. 16).

Huddleston, Q. C., was stopped by the court.

ERLE, C. J.—I am of opinion that the rule should be made absolute to enter a verdict for the plaintiffs. The action was on a joint and several promissory note for 150*l.* made by Charles Mayor as principal and the defendants as sureties. Charles Mayor had obtained a loan of 650*l.*, upon the security of an assignment of his wife's interest in certain property under the will of her late father, and of a policy of insurance for 500*l.* on his own life; and it was agreed that the promissory note in question should be given for 150*l.* more. The note was given on the 7th of December, and the deed was executed on the 22d. The question is, whether the debt created by the promissory note is merged in the deed. I think it is quite clear that it is not. The deed and the promissory note are between different persons, for different sums, involving different terms, and at different rates of interest. *Sharpe v. Gibbs*, 16 C. B. N. S. 527 (E. C. L. R. vol. 111), and the case there cited, of *Ansell v. Baker*, 15 Q. B. 20 (E. C. L. R. vol. 69), are sufficient authorities to show that the simple-contract debt on the promissory note did not merge in the higher security of the specialty. *If the specialty is not co-extensive with the [*82 simple-contract debt, the two may co-exist. Then, was there time given to Charles Mayor, the principal debtor, so as to operate a discharge of the liability of the sureties? By the deed the mortgage-debt was covenanted to be paid on the 22d of June; the promissory note was payable *on demand*. The covenant to pay in June operates so that no action shall be brought thereon until that time. But there is no engagement on the part of the plaintiffs that they will abstain from pursuing any other remedies until then. It seems to me therefore that the deed did not operate to give time to the principal. The cases cited by Mr. Cave as to the effect of mortgages, and to show that the deed is conclusive evidence of the intent of the parties, were no doubt soundly decided upon the facts then before the court. Effect must, if possible, be given to the intention of the parties. My judgment is giving effect to the intention. Parol evidence must be admissible to let in the whole truth; and indeed it must be admitted in order to raise the point on which Mr. Cave relies.

BYLES, J.—I am of the same opinion, though I was at first somewhat struck by the argument urged on the part of the defendants. As to the question of merger, the rule is well established, that, unless the two are strictly co-extensive, the simple-contract debt is not merged

in the specialty. *Sharpe v. Gibbs*, 16 C. B. N. S. 527 (E. C. L. R. vol. 111), is a distinct authority to that effect. Watson's evidence, as reported by my Lord, clearly shows that it was intended that it should not. And the jury so found. The effect of giving time was recently under the consideration of Vice-Chancellor Page Wood in a case of *Webb v. Hewitt*, 3 K. & J. 438, where it was held that a creditor, *83] upon giving time to *his debtor, may reserve any right against the surety, and this without communicating the arrangement to the surety. The learned Vice-Chancellor says: "As to giving time, the authorities, which are almost innumerable, have settled, that, upon any giving of time to a principal debtor, if there be a reservation of rights against the surety, the surety is not discharged; for, when the right is reserved, the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for, he was a party to the agreement by which that right was reserved to the creditors, and the question whether or not the surety is informed of the arrangement, is wholly immaterial." Here, if Watson's evidence was true,—and the jury gave credit to it,—there was assent to what was done, both on the part of the principal debtor and of the sureties.

KEATING, J.—For the reasons already given, I concur with my Lord and my Brother Byles. Mr. Cave relied mainly upon *Price v. Moulton*, 10 C. B. 561 (E. C. L. R. vol. 70), to show that this was a case of merger. That case, however, does not sustain the argument: it does not lay it down as a general proposition, that wherever there is a security by specialty, the simple-contract debt is merged. The question there arose on demurrer: it was admitted therefore on the record that the identical debt sued for was the subject-matter of the mortgage security. But, in the course of the argument, Williams, J., put the following question to my Brother Willes, who was counsel for the plaintiff,—“Would this deed operate as a merger, if it had been expressly stipulated that it should be a collateral security only?” *84] *And the learned counsel declined to affirm that. At first I was inclined to adopt Mr. Cave's argument, and to think that the non-communication of the arrangement protected the sureties. But the authorities are clearly the other way. I see no reason for holding that the principal debtor might not have been sued on the note immediately.

MONTAGUE SMITH, J.—I am of the same opinion. Upon the evidence of Watson, which the jury have affirmed, the note was a collateral and additional security. It is said that the force of the deed which was subsequently executed, was, to merge the remedy on the promissory note. *Ansell v. Baker*, 15 Q. B. 20 (E. C. L. R. vol. 69), and *Sharpe v. Gibbs*, 16 C. B. N. S. 527 (E. C. L. R. vol. 111), however, are clear and distinct authorities against that argument. Then, was the arrangement such, that, because the principal debtor could not be sued on the note until the 22d of June, 1864, the sureties were discharged? We are to decide this case upon legal grounds: but I should have been very much surprised to find the rule of law at variance with that of equity on the subject. The case of *Wyke v. Rogers*, 1 De Gex, M'N. & G. 408, shows that it is not. There A.

B. entered into a bond as a surety: the creditor subsequently took from the principal debtor a promissory note for the amount, payable in two months, but afterwards, in consequence of the insolvency of the debtor, sued A. B. on the bond. A. B. then filed his bill, to restrain the action, on the ground that he was discharged from liability by the giving of the promissory note: the creditor by his answer denied that such was the effect of the transaction; and on the hearing an inquiry was directed in respect of the circumstances under which the promissory note had been given. The master reported, that, though there was not any written or any *distinct parol agreement between the parties, yet there was a general understanding that the giving of the note was not to affect the bond: and it was held, on further directions, that, under these circumstances, there was no case for the interference of a court of equity. [*85]

Rule absolute.

A right may be extinguished by satisfaction, as by actual payment, or by substitution, as by receiving something else in its stead. A plurality of rights which relate to the same object cannot co-exist, unless they stand towards each other as principal and accessory, for the higher merges the lower right, and the remedy is confined to the superior title.

The theory of the law upon this interesting point is developed by C. J. Gibson, as follows:—"There is a substantial distinction, which I have not seen particularly noticed, between cases of extinguishment by merger of the security, and cases of extinguishment by satisfaction of the debt. These classes, though depending on different principles, have usually been confounded; and hence a perceptible want of precision in the language of those who have written or spoken of them. In the first of them, the original security is extinguished, but the debt remains: in the second, the debt as well as the security is extinguished by the acceptance of another debt in payment of it. Extinguishment by merger takes place between debts of different degrees, the lower being lost in the higher; and, being by act of law, it is dependent on no particular intention; extinguishment by satisfaction

takes place indifferently between securities of the same degree or of different degrees; and being by act of the parties, it is the creature of their will. No expression of intention would control the law which prohibits distinct securities of different degrees for the same debt; for no agreement would prevent an obligation from merging in a judgment on it, or passing in *rem judicatam*. Neither would an agreement, however explicit, prevent a promissory note from merging in a bond given for the same debt by the same debtor; for, to allow a debt to be, at the same time, of different degrees, and recoverable by a multiplicity of inconsistent remedies, would increase litigation, unsettle distinctions, and lead to embarrassment in the limitations of actions and the distribution of assets."

"Merger takes place only where the debt is one, and the parties to the securities are identical. Hence there is no extinguishment where a stranger gives bond for a simple contract-debt, or confesses a judgment for a debt by specialty. In either case, the original debt may be extinguished by the subsequent one; but not by merger, which works a dissolution, not of the debt, but of the original security, whose existence sinks into that of the succeeding one; and for that purpose, the

union must be so intimate that the one cannot be separated from the other. In case of merger, therefore, the debt is the same, though the old evidence of it melts into the new one, and the creditor merely gains a higher security, without having an indivisible debt of different degrees; but such a result is not obtained when the debt is compounded of new responsibilities, as it must be where all the parties were not originally bound. Where the debtor is bound with a stranger, or for a different sum, his responsibility is changed in more respects than the quality of his security. The difference, on the whole, consists in this, that in a case of merger, there is a change only of the security; but in a case of satisfaction by substitution, there is a change of the debt:" *Jones v. Johnson*, 3 W. & S. (1842) 276.

In *Baker v. Baker*, the grand distinction between merger and satisfaction was not strictly observed in the language of the court, though the decision was correctly made on the facts presented by the case. The debtor gave his bond for a sum smaller than the debt, and the creditor brought suit for the difference. As the bond was not for the identical debt, it could not cause a merger, and therefore the court was correct in determining from the evidence whether it was received as satisfaction:" 4 Dutch. (N. J. 1859) 13.

The court accordingly decides as a matter of law, without reference to the intention of the parties, whether a merger has taken place, which compels a resort to the higher remedy. If suit can be brought immediately, without any additional requirements, upon the substituted instrument, it shows that the right is the same, and that merger has consolidated the remedy. This test seems practically to distinguish substitution from merger; in

both cases suit must be brought upon the substituted instrument, but in merger the remedy alone has been changed, whilst in substitution the right as well as the remedy has been altered. *Montgomery v. St. Steven's Church* illustrates this point. There the defendants, a church, executed and delivered to the plaintiff a writing under seal, reciting that the plaintiff, having lent them a sum of money, was "entitled to receive payment of the same, without interest, from the sale of pews," payment *pro rata* to be made when any sale was effected and the purchase-money received. The court construed the instrument to be conditional, and not absolute for the immediate payment of the money, and held that the plaintiff could not recover in debt upon it without averring a sale of the pews or a refusal to sell them on the part of the defendants: 4 W. & S. (Pa. 1842) 542. The character of the debt being altered by the substituted instrument, it could not operate as a merger, though it might cause satisfaction by substitution, if accepted as such.

The question of merger once disposed of, the point of difficulty arises. It is this: shall the instrument operate as satisfaction by substitution of, or merely as collateral security for, the debt? This question turns on the intention of the parties. In default of evidence, however, the law presumes, in the first instance, a higher security between different parties or for a different sum to have been accepted only as collateral security.

The debtor's promissory note amounts in substance only to the liquidation of the debt and its acknowledgment in an available form for collection. As the debtor does not fulfil his duty until he has paid the debt, no promise which he can make will be equivalent to perform-

ance, and being short of that, furnishes the creditor no consideration for the agreement. Though the later decisions ignore this truth, and reckon the negotiability and acknowledgment as consideration sufficient to support the note, it is well to bear in mind the real nature of the new agreement, as it is important in determining the ulterior question of the operation of the note, now that its validity is sustained. The law presumes it, in the first instance, to have been taken as collateral security for the indebtedness.

If the debtor's promissory note be merely collateral, it ought not to have any effect upon the principal debt. To maintain a consistent attitude, the courts should refuse to imply an agreement to give time for the payment of the debt, though the terms of the note put off the day of payment. This was done in *Shaw v. Presbyterian Church*, 3 Wright (Pa. 1861) 226.

The general rule, however, is that the taking of a note which by its terms postpones the day of payment, operates as an extension of credit: *The Kimball*, 3 Wall. (1865) 37; 2 Parsons on Notes and Bills 154.

And in some states the law even presumes it to have been taken in satisfaction of the pre-existing debt: *Arnold v. Sprague*, 5 Shaw (1861) 402; *Robinson v. Hurlburt*, Id. 115; *Paine v. Dwinel*, 2 Virgin (Me. 1865) 52. Evidence may rebut this presumption: *Surdam v. Lyman*, 1 Veazey (Vt. 1864) 733.

But the law will not raise this presumption when the creditor would in consequence of it lose his security or lien: *Page v. Hubbard*, Sprague (1857) 835; *Edwards v. Derrickson*, 4 Dutch. (N. J. 1859) 39; *Kidder v. Knox*, 4 Hubbard (Me. 1860) 551. *The Kimball*, 4 Wall (U. S. Sup. Ct. 1865) 37. *A fortiori*, where the note does not

operate as an extension of credit, will the creditor's security or lien upon the debtor's property not be presumed to be given up: *Jones v. Shawhan*, 4 W. & S. (Pa. 1842) 257; *Sutton v. The Albattross*, 1 Phila. (Pa. 1854) 423; *Selzer v. Coleman*, 8 Casey (Pa. 1859) 493.

The English rulings are more consistent, and the creditor loses his lien or security by taking the debtor's note. On non-payment of the note at maturity the debt revives, but the lien is gone: *Tamvaco v. Simpson*, *post*, 478: *contra*: *Howard v. Jones*, 33 Mo. (1863) 583.

Hart v. Boller was an action against an endorser. The original note was duly protested at maturity; subsequently a renewal was taken, and the endorser was discharged upon it by default of demand and notice. He insisted that the acceptance by the plaintiff of the renewal extinguished the old note, and thus released him from all liability. The court charged the jury, as a matter of law, that the second note was not a satisfaction or discharge of the first. On error, Tilghman, C. J., said: "It is a general rule, that if one indebted to another by note, gives another note to the same person for the same sum, without any new consideration, the second note shall not be deemed a satisfaction of the first, unless so intended, and accepted by the creditor. But if so accepted, it is satisfaction. The *quo animo* it was accepted is matter of *fact*, which the court cannot take to itself, and exclude the jury from the decision of it. The intent may often be deduced from circumstances, though nothing positive was expressed:" 15 S. & R. (Pa. 1826) 162.

Weakley v. Bell was an action against an endorser on a firm-note of Gray & Cauffman. Some time after its maturity Gray gave his individual notes for an amount which included this debt to

the plaintiffs at fifteen and thirty days respectively. The question was whether these new notes were to be considered in satisfaction of the old firm-note. The jury determined that they were taken merely as collateral security; and the endorser was therefore held liable. Kennedy, J.: "Hence it appears (from a full review of the authorities) that taking a new note for the same debt mentioned in the old, without any agreement to give time to the drawer, or to deliver up the old note to him, or that the new shall be taken in satisfaction of the old note, has ever been considered a mere collateral security, which does not affect or alter the original liabilities of the parties on the old note in any respect whatever. The case also of *Gould v. Robson* may be considered as having been decided with a view to the recognition of this principle, though it may be questionable whether the court did not go too far there in deciding that there was an agreement to give time. The holder of the bill, upon receiving a part of it at maturity, took a second bill for the residue, payable at a future day, *agreeing to hold the original bill as a security until the second should become payable*; and the court were of opinion that the agreement to hold the original bill until the second should become payable, amounted to an agreement on the part of the holder, not to sue on the original bill until the second should become payable, and consequently the drawer was thereby released:" 9 Watts (Pa. 1840) 273; *Merrick v. Boury*, 4 Ohio State (1854) 60; *Leach v. Church*, 15 Ohio State (1864) 169; *Powell v. Blow*, 84 Mo. (1864) 485.

The point thus decided gave rise to a protracted controversy in New York. In *Arnold v. Camp* it was held, also, that a partner's note re-

ceived in payment of a firm-liability might operate as a satisfaction of the partnership-debt if such was the agreement of the parties: 12 Johns. (N. Y. Supreme Court 1815) 409. This position was contested, and the decision overruled in *Cole v. Sackett*, on the general ground ruled in *Frisbie v. Larned*, 21 Wend. (N. Y. 1839) 450, that a debtor's note lacked a fresh consideration, and could not therefore serve as the groundwork of an accord and satisfaction. In this view the firm-note on which the partners are liable in *solido* merely promises to do what the debtors are already as strongly bound to do, whereas a partner's individual note for the firm-liability cuts off from the creditor a part of his original consideration; to wit, the liability of the other members of the partnership: 1 Hill (N. Y. 1841) 516. This decision was affirmed after full consideration in *Waydell v. Luer*, 5 Hill (N. Y. 1843) 448. The authority of this case was not, however, acquiesced in, but questioned in the court of errors, and there repudiated by the senators: *Waydell v. Luer*, 3 Denio (N. Y. 1846) 410. Thus, after thirty-one years of unsettled law, New York has returned to the position which she originally took in 1815. The overthrow of *Cole v. Sackett* carries with it *Frisbie v. Larned*, and establishes the proposition that the debtor's promissory note is sufficient to extinguish the antecedent debt for which it was given, if it were accepted on that understanding: *East River Bank v. Butterworth*, 45 Barb. (N. Y. 1866) 476.

In *Fisher v. Marvin* the debtor took up his note held by a bank, and replaced it by another, which the bank discounted. This renewal was held by the court to be an extinguishment of the debt: 47 Barb. (1866) 159.

As the validity of the note has been recognised, it may be satisfaction if the evidence establish such an understanding: *Coon v. Brown*, 13 Ind. (1859) 150.

The note or other security of a third person is likewise presumed to be taken as collateral security—as conditional payment, that is, satisfaction if and when paid. *Tyson v. Pollock*, 1 Pa. (1830) 375, was the case of a special verdict, from which it appeared that partners gave their individual drafts for a firm-liability. The court treated them as notes of third persons, and inferred that they were collateral to, and not in satisfaction of, the partnership liability. *McIntyre v. Kennedy* was a case stated, in which defendants gave their own check and that of a stranger in payment of a debt due to the plaintiff. Stranger stopped payment before his check was presented, though done in reasonable time. It was held that they were not taken in satisfaction of the debt, but as collateral security. Woodward, J.: "The mere acceptance by the creditor of a negotiable note of a third person makes it but collateral security. If the note be taken as payment, that is ordinarily and *prima facie* but conditional payment. But the note will operate as an immediate and absolute satisfaction and discharge of the debt if such be the

intention and understanding of the parties, and such intention is to be implied when the notes of a third person are accepted in payment at the time the purchase is made, for it is understood as an exchange or barter; but where they are given for a pre-existing debt, the presumption is the other way, and nothing short of an actual agreement, or some evidence from which a positive inference of discharge can be made, or proof of fraud, will suffice: 5 Casey (Pa. 1857) 448; *Noel v. Murray*, 3 Ker. (N. Y. 1855) 167; *Smith v. Applegate*, 1 Daly (N. Y. 1860) 91; *Blakely v. Jacobson*, 9 Bosw. (N. Y. 1861) 153; *Crane v. McDonald*, 45 Barb. (N. Y. 1817) 854; *Locke v. Mackinson*, 14 La. An. (1859) 361; *Gails v. The Osceola*, 14 La. An. (1859) 54; *Graham v. Sykes*, 15 Id. (1860) 49; *Robinson v. Hurlburt*, 5 Shaw (Vt. 1861) 115; *Citizens' Bank v. Carson*, 82 Mo. (1862) 191; *Howard v. Jones*, 38 Id. (1868) 588; *Devlin v. Chamblin*, 6 Minn. (1861) 468; *Keough v. McNitt*, Id. 513; *Phoenix Ins. Co. v. Allen*, 11 Mich. (1863) 501; *White v. Jones*, 38 Ill. (1865) 159.

In *Lyon v. Northrup* the acceptance of a check drawn by a third person in payment of a judgment-debt was held to be satisfaction: 17 Iowa (1864) 314.

HARTLEY and Others v. MARE. *May 9.*

After action brought, the defendant executed a deed of inspectorship under s. 192 of the Bankruptcy Act, 1861, which was duly filed, &c., before judgment signed. Execution was afterwards issued, and the defendant's goods taken:—Held, that the execution so issued could not be made available without the leave of the court under s. 198, notwithstanding the defendant might have pleaded the deed.

A WRIT under the Bills of Exchange Act, 18 & 19 Vict. c. 67, was issued against the defendant at the suit of the plaintiffs on the 29th of December, 1864, for 149*l.* 19*s.* 9*d.* principal and interest due to the plaintiffs as drawers of a bill accepted by the defendant. The plaintiffs, being unable to effect personal service of the writ, on the 17th of January, 1865, obtained a judge's order under the 17th section of the Common Law Procedure Act, 1852, for leave to proceed as if personal service had been effected. On the 7th of February, judgment was signed and on the 8th a *fi. fa.* issued, under which the defendant's goods were seized.

On the 3d of January, 1865, the defendant executed a deed of inspectorship under the 192d section of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, the validity of which was not disputed, which provided for his carrying on his business under inspection, and also contained a clause making the deed pleadable in bar as a release.^(a) This deed was registered under the Bankruptcy Act on the 2d of February.

*86] The inspectors on the 11th of February gave notice to the sheriff of their claim, whereupon he took out an interpleader summons, which was served on the plaintiffs and the claimants. The interpleader summons came on to be heard before Byles, J., on the 14th of February, when that learned judge directed that the sheriff should withdraw, upon the claimants giving security or bringing 165*l.* into court,—the validity of the deed and all questions thereon being referred to the court. After some delay, the 165*l.* was handed to the sheriff of Kent, and by him brought into court.

R. E. Turner, on a former day in this term, obtained a rule calling upon the inspectors and the sheriff to show cause why the sum of 159*l.* 3*s.* 11*d.*, with costs of motion, should not respectively *87] be paid out of court to the plaintiffs or their attorneys, out of the 165*l.* so paid into court as above mentioned. He submitted that,

(a) The material clauses of the deed were as follows:—

“And the said creditors do and each and every of them doth by these presents give and grant unto the said debtor full, free, and absolute liberty and license henceforth to conduct, manage, and carry on his said business, and to collect, get in, release, and dispose of all his real and personal estate of or to which he is now seised, possessed, or entitled, under the inspection and subject to the approbation, direction, and control of the said inspectors or inspector, during the period of six calendar months from the said 1st day of January instant.”

“And it is hereby further agreed and declared, that, if any of the said creditors shall at any time whilst these presents are in force commence, prosecute, or continue any action, suit, or other proceedings against the said debtor, in respect of their respective debts, claims, or demands, these presents, and the provisions herein contained, shall operate and have the same force and effect as an order of discharge granted to the said debtor under the Bankruptcy Act, 1861, and this declaration and agreement may be pleaded and used in bar of or as a defence or answer to every such action, suit, or other proceeding, in like manner, and with the same effect as an order of discharge under the Bankruptcy Act, 1861, might be pleaded and used, in case the said debtor had been adjudicated bankrupt on the day of the date of these presents, and had obtained his order of discharge under such adjudication.”

as the defendant had an opportunity of pleading his discharge under the deed, and omitted to avail himself of it, he was precluded from setting it up now,—referring to *Whitmore v. Wakerly*, 3 Hurlst. & Colt. 538.

J. Brown, Q. C., and *Lanyon*, now showed cause, upon an affidavit setting out the material clauses of the deed, and averring that all the requisitions of the statute had been complied with, so as to entitle the defendant to the protection thereby conferred on compounding debtors. The inspectors are entitled to the fund in court, and this rule must be discharged. The deed was registered on the 2d of February, and judgment was not signed until the 7th; therefore, it is said, the defendant might have pleaded it, and, having omitted to do so, is estopped from now relying upon it. To that argument there are two answers. In the first place, it does not appear that the defendant had an opportunity of pleading the deed. The twelve days allowed by the statute for the defendant's appearance to the writ had elapsed before the registration of the deed. (a) The defendant, therefore, could not have pleaded the deed. If it had been registered within the twelve days, there might have been something in the argument. But, assuming that the defendant might have [*88 pleaded the deed, the plaintiffs are precluded by the 197th and 198th sections of the Bankruptcy Act, 1861, from availing themselves of their execution. The 197th section enacts, that, "from and after the registration of every such deed or instrument in manner aforesaid (ss. 192, 194), the debtor and creditors, and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act, in the same or like manner as if the debtor had been adjudicated a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies, with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy." And the 198th section enacts, that, "after notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, *shall be available to any creditor or claimant, without leave of the court*; and a certificate of the filing and

(a) The 2d section of the 18 & 19 Vict. c. 67 enacts that "a judge of any of the superior courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ, and to defend the action, on the defendant paying into court the sum endorsed on the writ, or upon affidavits satisfactory to the judge which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the judge may seem fit."

registration of such deed under the hand of the chief registrar and
 *89] *the seal of the court shall be available to the debtor for all purposes as a protection in bankruptcy." The "leave of the court" here means leave of the *Court of Bankruptcy*,—*Skilton v. Symonds*, 18 C. B. N. S. 418 (E. C. L. R. vol. 114),—and that has not been obtained. If the defendant had been arrested, he would have been at once discharged: *Leigh v. Pendlebury*, 15 C. B. N. S. 819, 820 (E. C. L. R. vol. 109); *Skilton v. Symonds*,—which last-mentioned case virtually overrules *Whitmore v. Wakerley*, 3 Hurlst. & Colt. 538. It is for the plaintiff to apply to the court for leave to issue process, and not for the defendant to come and ask protection. He has it already by force of the direct words of the statute. *Bellhouse v. Mellor*, 4 Hurlst. & N. 116, is a distinct authority to show that the inspectors here are entitled to this money. The facts of that case were these:—On the 16th of July, 1848, the defendants, who were traders, filed in the Court of Bankruptcy a petition for arrangement, praying that their persons and property might be protected from all process until further order. On the same day, a commissioner made an order which, after reciting the petition and prayer for protection until further order, proceeded,—“I hereby grant such protection, and order that the persons and property of the petitioners be protected from process *until the 29th of July next*,” and the commissioner also thereby appointed a meeting on the 29th of July, at 12 o'clock at noon, for the creditors to assent to or dissent from the proposed arrangement. About 11 o'clock in the forenoon of the 29th of July, the plaintiffs took in execution the defendants' goods under a writ of *fi. fa.* On the 3d of August, the defendants were adjudicated bankrupts. It was held,—first, that the order was valid within the 211th section of the Bankrupt Law Consolidation Act, 1849, which enables the court to grant protection “until further order,” and to renew
 *90] *the same from time to time,—secondly, that the protection extended to the whole of the 29th of July,—thirdly, that, the order being valid, the assignees under the bankruptcy were entitled to the proceeds of the execution. That case was confirmed by the Court of Queen's Bench, in *Williams v. Dray*, 29 Law J., Q. B. 86.

Lush, Q. C., and *R. E. Turner*, in support of the rule.—The defendant might have pleaded the deed, and did not, and therefore he cannot now set it up against the plaintiffs' judgment. The 3d section of the Bills of Exchange Act enacts, that, “after judgment, the court or a judge may, under special circumstances, set aside the judgment, and, if necessary, stay or set aside execution, and may give leave to appear to the writ, and to defend the action, if it shall appear to be reasonable to the court or judge so to do, and on such terms as to the court or judge may seem just:” so that, notwithstanding the lapse of the twelve days, the defendant still might have set up this deed, if it afforded him any defence to the action. [MONTAGUE SMITH, J.—What do you suggest the defendant should have pleaded?] A clause in the deed which has been held equivalent to a release: *Clapham v. Atkinson*, 4 Best & Smith 722, 730; *Walker v. Nevill*, 34 Law J., Exch. 73; *Lyne v. Wyatt*, 18 C. B. N. S. 593 (E. C. L. R. vol. 114). This is not an application to the discretion of the court, or to set aside the writ. It is in effect an interpleader issue, to try whether the

execution-creditor or the inspectors under the deed be entitled to the money. The deed contains no assignment of the debtor's property, therefore it still remains in him. [BYLES, J.—The 198th section of the Bankruptcy Act, 1861, puts assignments and deeds of inspectorship upon the same footing.] *Whitmore v. Wakerley*, 34 *Law J., Exch. 88, is precisely in point. The Lord Chief Baron there [*91] says,—“Though fraud be a possible result, we must give effect to the law of the land: and, as the defendant did not plead the deed when he had the opportunity, he cannot avail himself of it now.” An *audita querela*, which was an application to the equitable jurisdiction of the court, did not lie where there was any other remedy at law, either by plea or otherwise: *Young v. Collet*, Sir T. Raym. 89. And therefore where the party had time to take advantage of the matter which he had in discharge of himself, and neglected it, he could not afterwards be relieved by *audita querela*: 1 Rol. Abr. 806 (C), pl. 1; 2 Wms. Saund., notes to *Turner v. Davies*, 147 et seq.” The question decided in *Skilton v. Symonds*, 18 C. B. N. S. 418 (E. C. L. R. vol. 114), is quite beside that which arose in *Whitmore v. Wakerley*. The 198th section of the Bankruptcy Act, 1861, has reference only to proceedings where the sole remedy is by application to the court. *Bellhouse v. Mellor*, 4 Hurlst. & N. 116, stands on a very different footing: there, the defendant had a protection in bankruptcy; and the application was, to set aside process which had improperly issued against him. Here there is no application to set aside the process: and the ordinary operation of a writ of *fi. fa.* is, to vest the goods from the time of seizure in the execution-creditor. [ERLE, C. J.—If this had been a *ca. sa.*, instead of a *fi. fa.*, the sheriff must have released the defendant on production of the certificate.] It appears from the affidavits that the deed in question was executed on the 3d of January, registered on the 2d of February, and gazetted on the 3d. It does not appear, therefore, to have been registered within the twenty-eight days allowed by the 194th section. [Brown.—The registrar will not receive the deed after the expiration of the twenty-eight days. ERLE, C. J.—We must give *credit to the act of the officer. He has forty-eight hours to register the deed. It [*92] may have been delivered to him on the 31st of January.]

ERLE, C. J.—I am of opinion that this rule should be discharged. The action is brought by a creditor against Mare, the debtor. After the commencement of the action, the debtor executed a deed of inspectorship, which is admitted to be valid under the 192d section of the Bankruptcy Act, 1861. After that deed had been executed and registered, and a certificate of registration given to the defendant, judgment was signed, and a *fi. fa.* issued by the plaintiffs, under which the defendant's goods were taken in execution. The inspectors named in the deed preferred a claim, and the money now sought to be obtained out of court was paid in by them under an interpleader summons: and we are now called upon to say whether the execution-creditors or the inspectors are entitled to that money. I am of opinion that the inspectors are. The deed is one which gives Mr. Mare all the advantages of a protection in bankruptcy. My judgment turns on the 198th section of the act, which provides that, “after notice of the filing and registration of such deed has been given as aforesaid, no

execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, without leave of the court: and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the court, shall be available to the debtor for all purposes as a protection in bankruptcy." No leave of the court has been obtained here. The plaintiffs are creditors *93] *who have issued an execution against the goods of the debtor, and who are seeking to make it available after the execution and registration of a deed valid under the act. What is the meaning of this general enactment? It is contended that it is confined to judgments obtained after the execution and registration of the deed. But the language of the enactment is universal: "no execution against the debtor's property, &c., shall be available to any creditor, without leave of the court." I think this process cannot be available to the plaintiffs, and that the money in question must be handed to the inspectors, whose money it is. The words are general, and we are bound to give effect to them according to their plain meaning. The construction which we put upon this section in *Skilton v. Symonds* is quite consistent with our present decision. We have been pressed with the opinion of the Court of Exchequer in *Whitmore v. Wakerley*, 34 Law J., Exch. 83, as being an authority the other way. There, however, the application was to set aside the *fi. fa.* *Wakerley* had lost the benefit of the deed of composition by having omitted to plead it when he had an opportunity. The judgment here will not conflict with the judgment there given, if what the court meant was, that the defendant was trying to avail himself on motion of a deed which he might have pleaded but had omitted to plead. The defendant was seeking to set aside the writ. He had no right to ask the court to set aside the writ. It was perfectly competent to the plaintiff there, as it was for the plaintiff here, to go on to judgment; and, for aught I know, he might issue a *fi. fa.* But the moment he seeks to put the sheriff in motion, and tries to make the execution available either against the property or the person of the debtor, the 198th section comes into operation; and the court out of which the process *94] issues has a right to say "You shall *not make your writ available in contravention of the act of parliament. I do not think there is necessarily any conflict between *Whitmore v. Wakerley* and the present case. The argument as to laches has no application where a third party's interest intervenes. The whole of these enactments of the Bankruptcy Act from 192 to 199 are framed in the interest of the general body of creditors, against one. Here, the inspectors intervene for the protection of the creditors generally. Those arguments, therefore, which would be good as against the defendant, have no relevancy to take away the rights of the general body of the creditors as represented by the inspectors.

BYLES, J.—I am of the same opinion. I rely entirely on the 198th section of the Bankruptcy Act, 1861, which provides that, after notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's

property in respect of any debt, and no process against his person in respect of any debt, shall be available to any creditor, without leave of the court. The affidavits in this case show that all the preliminaries have been duly observed; and therefore by the express words of the statute the plaintiffs' execution is not to be available to help them to the 165*l.* or any part thereof. I must confess I do not see any conflict between the decision of the Exchequer in *Whitmore v. Wakerley* and that to which we are coming here. A writ of execution may be in force and perfectly valid until it is sought to make it available by seizure. It might be prejudicial to the plaintiffs' interest to have it set aside. We are not asked to set aside the *fi. fa.* here: all we are asked to do, is, to say that the plaintiffs' execution shall not be made available in defiance of the 198th section of the statute.

*KEATING, J.—I am of the same opinion. If we were to make this rule absolute, we should be doing precisely that [*95 which the 198th section says shall not be done, namely, making the *fi. fa.* of the plaintiffs available against the goods of the debtor after all the conditions prescribed by the statute have been duly complied with, and thus giving to one creditor money which the law says shall be distributed amongst the general body.

MONTAGUE SMITH, J.—I am of the same opinion. The 198th section of the Bankruptcy Act, 1861, is perfectly general in its terms, and cannot, I think, be read as the counsel for the plaintiffs suggest it should be read. Taking the 197th and the 198th sections together, I agree with my Brother Keating, that, if we were to make this rule absolute, we should be making the execution of the plaintiffs available for a purpose for which the statute says it shall not be made available.

ERLE, C. J.—We think there were fair grounds for contesting the matter, and therefore that there should be no costs.

Rule discharged, without costs.

*LOCK v. HENRY FURZE, Executor of JOHN FURZE, [*96
deceased. May 11.

1. The rule in *Flureau v. Thornhill*, 2 W. Bla. 1078, that, where a contract of sale of real estate goes off in consequence of a defect in the vendor's title, the vendee is not entitled to damages for the loss of the bargain, does not apply to the case of a lease granted by one who has no title to grant it.

2. And it makes no difference that the lease is a lease in reversion, and not in possession,—at all events, where the lessee is already in possession of the premises under a valid subsisting lease.

3. A plea to an action for breach of the covenant for quiet enjoyment in such a lease,—that the plaintiff never had or entered into possession of the demised premises under or by virtue of the lease,—held bad, as attempting to put in issue matter neither expressly nor impliedly alleged in the declaration.

4. A. was in possession of premises under a lease from B. which would expire on the 4th of December, 1864. In February, 1860, A., in consideration of a premium of 400*l.*; obtained from B. a further lease of the same premises for twenty-one years and twenty-one days, to commence from the expiration of the former lease. On the death of B., in 1863, it was found that B. was only tenant for life, with power to grant leases in possession, and not in reversion, and consequently that the lease so granted by him to A. in February, 1860, was void. A. thereupon obtained from the reversioners a fresh lease for seven years, at a considerable increase

of rent, and sued C. (B.'s executor) upon the covenant for quiet enjoyment contained in the void lease:—

Held,—upon the authority of *Williams v. Burrell*, 1 C. B. 402,—that A. was entitled to recover (besides the 400*l.* premium and the costs of preparing the void lease) the difference in value between the term professed to be granted to him by that lease and the seven years' term which he obtained from the reversioners.

5. Held, also, that, in estimating the value of the term which the lessee had lost, it was not competent to the jury to give 10 per cent. in addition, as on a compulsory sale, by analogy to the practice in the case of lands taken by a railway or other public company.

6. Counsel's and surveyors' fees for advising on title, &c., not allowed as part of the costs of a lease.

THIS was an action for the breach of a covenant for quiet enjoyment contained in a lease.

The first count of the declaration stated, that by an indenture made the 14th of February, 1860, between John Furze, since deceased, of the one part, and the plaintiff of the other part, it was witnessed, that, for and in consideration of the sum of 400*l.* to the said John Furze paid by the plaintiff, the receipt whereof the said John Furze did thereby acknowledge, and also for and in consideration of the covenant for insurance against loss or damage by fire thereafter contained, and of the rent thereafter reserved and made payable, and of the covenants, clauses, provisoes, conditions, and agreements thereafter mentioned and contained, and which by or on the part and behalf of the plaintiff, his executors, administrators, and assigns, were *97] *to be paid, kept, done, observed, and performed, he the said John Furze by the said indenture did demise and lease unto the plaintiff a piece or parcel of ground, with the messuage, tenement, or dwelling-house thereon erected and built, situate, standing, and being in St. James's street, in the parish of St. James, in the city of Westminster, and numbered 6, with the erections and building behind the same at the bottom of the yard or garden, with the appurtenances. To have and to hold the said premises thereby demised, with the appurtenances, unto the plaintiff, his executors, administrators, and assigns, from the 4th of December, 1864, at which time an existing lease of the said premises would expire, for and during and unto the full end and term of twenty-one years and twenty-one days from thence next ensuing and fully to be complete and ended, yielding and paying therefor unto the said John Furze, his heirs and assigns, for the first twenty-one days of the said term the rent or sum of 10*l.*, and yielding and paying every year during the remainder of the said term thereby granted the clear yearly rent or sum of 175*l.*; such respective rents to be free and clear of and from the land-tax, sewers-rate, main-drainage-rate, and all other taxes, rates, charges, assessments, or impositions whatsoever: And the said John Furze did thereby covenant, promise, and agree to and with the plaintiff, his executors, administrators, and assigns, that the plaintiff, his executors, administrators, and assigns, paying the said yearly rent thereby reserved, and observing, performing, fulfilling, and keeping all and singular the covenants, clauses, provisoes, conditions, and agreements therein contained, and which on his and their parts and behalves were and ought to be paid, observed, performed, fulfilled, and kept, according to the true intent and meaning of the said inden- *98] ture, should and might peaceably and quietly have, hold, *use, occupy, possess, and enjoy the said piece or parcel of ground,

messuage or tenement, and all and singular other the premises thereby demised, with the appurtenances, for and during the said term of twenty-one years and twenty-one days thereby granted as aforesaid, without the lawful let, suit, trouble, denial, interruption, molestation, or disturbance of or by the said John Furze, his heirs or assigns, or any of them, or any person or persons whomsoever lawfully claiming or to claim by, from, through, under, or in trust for him, them, or any of them: Averment, that all conditions were fulfilled, and all things happened, necessary to entitle the plaintiff to maintain this action for the breach thereafter mentioned; yet that, after the making of the said indenture, and before this suit, and before and during the said term, one Frances Vickers, then lawfully claiming the said demised premises through and under the said John Furze, deceased, and having a good title to the same, and to the possession thereof, through and under him, claimed and demanded the said demised premises of, from, and against the plaintiff, and threatened to oust him from the possession and enjoyment thereof, whereby the plaintiff could not and did not peaceably or quietly have, hold, use, occupy, possess, or enjoy the said premises by the said indenture demised, with the appurtenances, for or during the said term thereby granted, or any part thereof, without the lawful let, suit, trouble, denial, interruption, molestation, and disturbance of the said Frances Vickers, so lawfully claiming through and under the said John Furze, deceased, as aforesaid; and that, by reason of the premises, the plaintiff was forced and obliged to and did take and accept a lease or appointment of the said premises from the said Frances Vickers for the term of seven years from the 25th of December, 1864, at an increased rent of 300*l.* *a year, and was put to great trouble and expense and costs in obtaining such lease or appointment, and [*99 had also lost the benefit of the said lease granted by the said John Furze, deceased, and of the said sum of 400*l.* paid for the same.

There was also a count charging the defendant as executor for money payable by him as executor as aforesaid to the plaintiff for money received by the said John Furze in his lifetime for the use of the plaintiff. Claim, 3000*l.*

The defendant pleaded to the first count of the declaration, that the said deed in that count mentioned was not the deed of the said John Furze, as alleged,—Secondly, to the said first count, that the plaintiff never had or entered into possession of the said demised premises under or by virtue of the said lease, as alleged,—Thirdly, to the said first count, that the said Frances Vickers did not claim the said premises, nor had she a good title thereto, nor to the possession thereof, through or under the said John Furze, deceased, as alleged,—Fourthly, to the said first count, that the said Frances Vickers did not claim or demand the said premises from the plaintiff, nor threaten to oust him from the possession or enjoyment thereof, as alleged,—Fifthly, to the last count, except as to the sum of 417*l.*, parcel of the money claimed, that the said John Furze never was indebted, as alleged,—Sixthly, as to the said excepted sum of 417*l.*, the defendant as such executor as aforesaid brought the same into court, &c.

The plaintiff joined issue upon all the pleas. He also demurred to the second plea, the ground of demurrer alleged in the margin

being, "that the plaintiff is entitled to maintain the action, even though he should never have had possession under the lease in question." Joinder.

*100] The cause was tried before Erle, C. J., at the sittings *in London after last Hilary Term, when the following facts appeared in evidence:—The plaintiff was in possession of certain premises in St. James's under a lease from the testator John Furze, bearing date the 9th of February, 1838, which would expire on the 4th of December, 1864, at the yearly rent of 150*l*. On the 14th of February, 1860, he obtained from him a further lease of the same premises for twenty-one years and twenty-one days from the expiration of the former lease, at the yearly rent of 175*l*. This lease contained a covenant on the part of John Furze, that the plaintiff, his executors, &c., paying the rent, &c., "should and might peaceably and quietly have and enjoy the demised premises for and during the said term of twenty-one years, &c., thereby granted, without any lawful let, suit, trouble, denial, interruption, molestation, or disturbance of or by the said John Furze, his heirs or assigns, or any of them, or any person or persons whomsoever lawfully claiming or to claim by, from, through, under, or in trust for him, them, or any of them."

In May, 1863, John Furze died. The defendant was his executor. In November, 1863, the plaintiff received an intimation on behalf of one Frances Vickers, a daughter of the deceased, that the lease of the 14th of February, 1860, was a void lease, and would not be recognised. It appeared, that, on the marriage of Frances Vickers in 1841, the testator had settled the premises in question upon her and the issue of the marriage, reserving to himself a life-interest, with power to grant leases for any term not exceeding twenty-one years, *to take effect in possession, and not in reversion or by way of future interest.*

After much negotiation it was ultimately arranged that the plaintiff should have a new lease of the premises granted to him by Frances Vickers and her husband for seven years from Christmas, 1864, in *101] *consideration of a premium of 400*l*. and a yearly rent of 300*l*.

The plaintiff thereupon brought this action against the defendant as the executor of John Furze, claiming by way of damages the difference in value between the void lease and the new lease from Vickers and wife, and also the 400*l*. which he had paid by way of premium to John Furze for the void lease, and 65*l*., the expenses he alleged he had been put to in consequence of the breach of the covenant for quiet enjoyment contained in that lease. Of this latter sum, 48*l*. was the amount of the expense which the plaintiff had incurred in the preparation of and in attempting to support the void lease (20*l*. of it consisting of counsel's and surveyors' fees), and 17*l*. the expense of the seven years' lease.

On the part of the defendant it was insisted, upon the authority of *Flureau v. Thornhill*, 2 W. Bla. 1078, and other cases, that the plaintiff was not entitled to recover any damages for the loss of his bargain; and that all he was entitled to, was, to have back the premium he had paid for the void lease, and the 17*l*. costs of preparing that lease,—which sums had been paid into court.

For the plaintiff, it was submitted that he was entitled to be reim-

bursed all he had lost by the testator's breach of contract, viz. the difference between the market value of the new lease and the lease he had lost, including the customary addition of 10 per cent. for compulsory sale, and also all the expenses he had incurred.

His Lordship ruled that the plaintiff was entitled to recover the difference between the value of the seven years' lease and the price which the reversionary lease would have fetched in the market.

The jury, assessing the value of the reversionary lease on the 6 per cent. tables, found the difference of value between the two leases to be 1320*l.*; to which they added 137*l.*, being 10 per cent. for compulsory sale, and 65*l.* for the expenses: and they accordingly returned a verdict for the plaintiff for 1522*l.* [*102]

Bovill, Q. C., on a former day in this term, obtained a rule to show cause why the verdict for the plaintiff on the second and fourth pleas should not be set aside, and instead thereof a verdict be entered thereon for the defendant, pursuant to leave reserved, on the ground that the facts proved at the trial did not entitle the plaintiff to a verdict upon those pleas: and why the damages should not be reduced to nominal damages, or to such sum as the court might direct, on the grounds that the plaintiff was not entitled to recover more than the sum of 400*l.* he had paid, and the 17*l.* expenses, which two sums the defendant had paid into court, and that he lost nothing but what he had paid; that he was not entitled to recover the 65*l.*, the costs, &c., of the second lease, or any part of it; that the plaintiff must have paid the costs of one lease, and that he was not entitled to throw those costs or any of them upon the defendant; and that the plaintiff was not entitled to the 10 per cent. which the jury gave as upon a compulsory sale: Or, why a new trial should not be had, on the ground that the learned judge misdirected the jury in telling them that the plaintiff was entitled to recover the difference in value between the lease which was avoided and the lease which was granted, and that the plaintiff was entitled to recover the 65*l.*; and also in directing them that the plaintiff was entitled to recover the 10 per cent. claimed as upon a compulsory sale; and that the learned judge ought to have directed the jury that the plaintiff was not entitled to recover those several matters respectively.

**Lush*, Q. C., *J. Brown*, Q. C., and *Archibald*, showed cause. (a) [*103]—The main question is, to what measure of damages the plaintiff is entitled for the testator's breach of the covenant for quiet enjoyment. It will be contended on the part of the defendant, that, under the circumstances, he is only liable for the amount of the premium paid by the plaintiff for the void lease, and the costs he was put to in obtaining it, by analogy to the rule laid down in *Flureau v. Thornhill*, 2 Sir W. Bla. 1078, and adopted in subsequent cases, that, where a contract for the sale of real estate goes off by reason of the vendor's defect of title, the vendee is entitled to no compensation for the loss of the bargain. The transaction here, however, went beyond a mere bargain. There was an absolute conveyance, with a covenant for quiet enjoyment. If the lease of February, 1860, had begun to run before the defect of title was discovered, beyond all question the plaintiff would have been entitled to recover damages for what he

(a) It was agreed that the demurrer should be argued with the rule.

had lost. That is so distinctly laid down by this court in *Williams v Burrell*, 1 C. B. 402 (E. C. L. R. vol. 50). Can it make any difference that the lease was to commence at a future time, that it was merely an *interesse termini*? It is submitted not. An *interesse termini* is an interest that is saleable and capable of being assigned or bequeathed: and it would be assets in the hands of an executor: notes to *Took v. Glascock*, 1 Wms. Saund. 250 g, n. (1). Although this was but an *interesse termini*, yet, being by deed, it vested an interest in the lessee immediately; an entry was not necessary for that purpose: see *Bac. Abr. Leases and Terms for Years* (N); *Blatchford, app., Cole, resp.*, 5 C. B. N. S. 514 (E. C. L. R. vol. 94). *Harrison v. Blackburn*, 17 C. B. N. S. 678 (E. C. L. R. vol. 112). [BYLES, J.—Some of the incidents *104] of an *interesse termini* are mentioned in *Sheppard's Touchstone* 267, and note (e) thereon by Atherley.] Although the general rule, is, that, where a contract of sale goes off for want of title in the vendor, the vendee is only entitled to recover the deposit and interest, with costs of investigating the title, that rule was held in *Hopkins v. Grazebrook*, 6 B. & C. 31 (E. C. L. R. vol. 13), 9 D. & R. 22 (E. C. L. R. vol. 22), and in *Robinson v. Harman*, 1 Exch. 850, not to apply where the vendor at the time of the contract knew that he had no title. In the last-mentioned case, Parke, B., says: "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. The case of *Flureau v. Thornhill* qualified that rule of the common law. It was there held, that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding, that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law; and I am unable to distinguish it from *Hopkins v. Grazebrook*." *Hopkins v. Grazebrook* and *Robinson v. Harman* are recognised in *Pounsett v. Fuller*, 17 C. B. 660.(a) Where a lease is granted, the rights of the parties are regulated by the covenants: it rests no longer in contract. Except for some technical purposes,—to maintain trespass, for instance, entry is not necessary to perfect the lessee's title, or to enable him to sue for a breach of covenant. In *Doe d. Rawlings v. Walker*, 5 B. & C. 111, 118 (E. C. L. R. vol. 11), 7 D. & R. 487 (E. C. L. R. vol. 16), Bayley, J., says: "The right upon a *105] lease to commence in *præsenti*, is,—except under the Statute of Uses,—until entry, an *interesse termini* only, and so is the right upon a lease to commence in *futuro*; and the same rules are applicable to both. Each is a *right* only, not an *estate*. The whole *estate*, notwithstanding such right, is in the lessor. In neither case will a conveyance by the lessee to the lessor operate as a surrender, nor will a release from the lessor to the lessee operate by way of enlarging the estate. The right may be granted away as a right, or extinguished by a release, but it cannot be conveyed as an estate; and the lessee may extinguish it by a release to the lessor, but it has all

(a) *Pounsett v. Fuller* received the assent of the Exchequer Chamber in *Sikes v. Wild*, 4 Best & Smith 421 (E. C. L. R. vol. 116).

the properties and consequences of a right only, and not an estate. Upon an ordinary lease, to commence instant, the lessee has at common law an *interesse termini* only till entry: Co. Litt. 46 b: a release to him before entry, to increase the estate is not good: Co. Litt. 46 b, 270 a: nor can the lessor grant away the estate by the name of the reversion, for, before possession by the lessee, there is no reversion in the lessor: Co. Litt. 270 a: nor can the lessee surrender the term: (a) and in the case of a lease to commence in futuro, all the common-law rules of an ordinary lessee before entry apply." To the same effect is Bac. Abr. *Leases and Terms for Years* (M.) In *Smith v. Compton*, 3 B. & Ad. 407, the defendant conveyed premises to the plaintiff, and covenanted for good title; an action of *formedon* was afterwards brought against the plaintiff by a party having better title, and the plaintiff compromised it for 550*l.*: and it was held that the plaintiff, in an action for the breach of covenant, might recover the whole sum so paid, and his costs as between attorney and client in the compromised suit, though he had given no notice of that suit to the defendant. Where the lessor covenants that he **will do nothing* [*106 to prevent the enjoyment of the demised premises by the lessee, he as much deprives the latter of the value of his estate and breaks his covenant by preventing the lessee from entering as by causing him to be evicted after entry. This doctrine was set up in the case of a mortgage of a leasehold by assignment, in *Williams v. Bosanquet*, 1 Brod. & B. 238 (E. C. L. R. vol. 5), 3 J. B. Moore 500 (E. C. L. R. vol. 4), where the whole argument is exhausted. Entry and possession are not traversable: 2 Chitt. Pl., 7th edit. 392 (i). According to *Williams v. Burrell*, 1 C. B. 402 (E. C. L. R. vol. 50), if the plaintiff had entered, it is conceded that he would have been entitled to recover. Is he the less entitled because he has by the default of the lessor been prevented from taking possession? Besides, the plaintiff had as much possession as it is possible for a man to have of a void lease. His original lease expired on the 4th of December, 1864; and the lease by the reversioners commenced at Christmas; there were, therefore, twenty-one days uncovered by either of those leases, and the plaintiff remained in possession. The objection on the other side would have been equally good, if the plaintiff had been in possession for ten years under the lease of February, 1860. In Platt on Leases 326, it is said: "To qualify a party to support an action on this covenant,"—the covenant for quiet enjoyment,—"*some positive act of molestation, or some deed amounting to a prohibition of enjoyment, must be proved: it is from the commission of an absolute disturbance, or from a prevention of enjoyment, not from an omission to perform something which, if executed, might add to the security of the possession, that a breach arises: mere passive neutrality is insufficient to give the covenantee a right of action; but from active measures, or hindrance of enjoyment only, can this right arise. It is not to be understood that an ouster or expulsion must take place*" [*107 in order to found a suit; it is enough that the quiet enjoyment of the covenantee be invaded or *prevented*. In the case of landlord and tenant, the covenant means a legal entry and enjoyment, without the permission of any other person: it follows, therefore, that a lease

(a) See Atherley's note to Shep. Touchs. 267.

previously granted, and subsisting at the time of the second demise, as it will defeat the second lessee of his right of entry and occupation, must work a breach of the lessor's covenant for quiet enjoyment: *Ludwell v. Newman*, 6 T. R. 458." That is strictly analogous here.

The second plea is clearly bad: it attempts to put in issue matter which is neither expressly nor impliedly alleged in the declaration. If it means an actual entry, it is wholly immaterial. If it means legal possession, the verdict on that plea must be entered for the plaintiff.

As to the mode of assessing the value of the interest which the plaintiff has lost, there has been nothing done to violate any rule of law. And the plaintiff is clearly entitled to the expense attending the grant of the new lease which through the testator's default he was obliged to take.

Bovill, Q. C., and *Garth*, in support of the rule.—There was no suggestion that any fraud was intended here, so as to make the doctrine in *Hopkins v. Grazebrook*, 6 B. & C. 31 (E. C. L. R. vol. 13), 9 D. & R. 22 (E. C. L. R. vol. 22), and *Robinson v. Harman*, 1 Exch. 850, applicable. This was a lease to commence in futuro: it was nothing more than an *interesse termini*. When a contract for the sale of land goes off for want of title, the vendee is entitled to nothing for the loss of the bargain. That is clearly settled. Upon what principle does the doctrine rest? It is this,—that the party is in no worse position than he was in the day before. He has lost nothing: it is *108] simply an accident that the vendor has not the title which he conceived he had. In *Mayne on Damages*, p. 95, it is said: "Analogous to the case of warranties in sale of chattels are the various covenants for title, authority to convey, quiet enjoyment, and against encumbrances, which are usual upon transfers of real property. The cases upon this point in England are very scanty, while they are to be found in remarkable abundance in America. Actions may be brought for breach of the covenant for title and authority to convey, before any eviction or disturbance of the plaintiff has taken place: *Kingdon v. Nottle*, 4 M. & Selw. 53. What ought to be the amount of damages under such circumstances? It is plain that the conveyance may, notwithstanding the defect of title, pass something to the covenantee, or it may in fact pass nothing at all. The former state of facts occurred in a very old case: *Gray v. Briscoe*, Noy 142. B. covenants that he was seised of Blackacre in fee-simple, where in truth it was copyhold land in fee, according to the custom. By the court: 'The covenant is (a) broken: and the jury shall give damages, in their consciences, according to that rate that the country values fee-simple land more than copyhold land.' This is exactly the same rule as we have seen before in the case of chattels personal, namely, that the measure of damages is, the difference between the value of the thing as it is and its value as it was warranted to be. On the other hand, the defect in the title may be so complete as to pass nothing from the grantor to the grantee. In such a case, in Massachusetts,—*Bickford v. Page*, 2 Mass. R. 455, 461,—it was said, 'The rule for assessing the damages arising from this breach is very clear. No land passing by the defendant's deed to the plaintiff, he has lost

(a) "Not," in the report.

no land by the breach of the covenant: *he has lost only the consideration he paid for it.* This he is *entitled to recover back, with [*109 interest to this time.' And it has been stated by Patteson, J.,—*Toppin v. Field*, 4 Q. B. 395 (E. C. L. R. vol. 45),—that, where a mortgage is made, with covenant for title, the measure of damages, in case of breach of the covenant, is, the original debt. Where the plaintiff has never got into possession of the land, and in consequence of the want of title never can, the above is clearly the proper measure of damages." If the party never was in possession, but had a mere *interesse termini*, he is just where he was. He loses nothing. What difference is there in principle between a purchase of land in fee, or for 999 years, or for 21 years? The mischief is the same in each case, and the same considerations apply to each. In *Sedgwick on Damages*, 2d edit. 156, the learned author says,—“Very little learning is to be found in the English books on the subject of the measure of compensation for the [breach of] covenants contained in conveyances.” Again, p. 159, it is said: “The question as to the measure of compensation came up at an early day in the state of New York, *Staats v. Ten Eyck's Executors*, 3 Caines 111 *f.* The defendants' testator, Ten Eyck, had conveyed certain lots in Albany to one Walsh, for 300*l.* Walsh had conveyed to Staats, Staats to Chinn, who had been evicted, and had recovered against the plaintiff, Staats. The covenants in Ten Eyck's deed were of seisin and for quiet enjoyment: and the two points were,—first, whether the plaintiff was entitled to recover the value at the time of the eviction, or only at that of purchase, and to be ascertained by the consideration given,—and, secondly, if the latter, whether the plaintiff was entitled to interest on the purchase-money, and the costs of the eviction. Kent, C. J., in the course of a very able opinion, said that the rule at common law on a warranty on a writ of *warrantia chartæ*, was, that the demandant *recovered in compensation only for the land at the time of the [*110 warranty made, and that he did not find that the law had been altered since the introduction of personal covenants. ‘Upon the sale of lands, the purchaser usually examines the title for himself, and, in case of good faith between the parties (and of such cases only I now speak), the seller discloses his proofs and knowledge of the title. The want of title is therefore usually a case of mutual error, and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be, if that rise was owing to the taste, fortune, or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser, without the hazard of absolute ruin.’ Mr. Justice Livingston said: ‘To find a proper rule of damage in a case like this is a work of some difficulty: no one will be entirely free from objection, or not at times work injustice. To refund the consideration, even with interest, may be a very inadequate compensation, when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet, to make this increased value the criterion, where there has been no fraud, may also be attended with injustice, if not ruin. A piece of land is bought solely for the purposes of agriculture; by some unforeseen turn of fortune, it becomes the site of a populous

city, after which an eviction takes place. Every one must perceive the injustice of calling on a *bonâ fide* vendor to refund its present value, and that few fortunes could bear the demand. However inadequate a return of the purchase-money must be in many cases, it is the safest measure that can be followed as a general rule. My opinion is that, where there has been no fraud, and none is alleged here, the party

*111] "evicted can recover only the sum paid, with interest from the time of payment, when, as is also the case here, the purchaser derived no benefit from the property, owing to a defective title." [BYLES, J.—At p. 170, the learned author refers in a note to a great number of authorities from nearly all the States, and he winds up thus,—“‘The ultimate extent,’ says Chancellor Kent (Comm. Vol. IV. p. 476), to whose laborious research I am indebted for the authorities in this note, ‘of the vendor’s responsibility under all or any of the usual covenants in the deed, is, the purchase-money, with interest; and this I presume to be the prevalent rule throughout the United States.’”] Numerous passages in the same book show that the prevailing rule in the American courts is as above mentioned. [ERLE, C. J.—The distinction put by Mr. Lush is, that this is a conveyance, not a mere contract. MONTAGUE SMITH, J.—Suppose a conveyance of land in fee, with a right of immediate possession, and the grantee entered, and was turned out by a superior title the next day? Or, suppose he never had possession?] If the grantee never had possession, the damages he would be entitled to would be simply the purchase-money and expenses. If he entered and was compelled to turn out, he would probably be entitled to something more. MONTAGUE SMITH, J.—How is that reconcilable with *Williams v. Burrell*?] That was a case sent from Chancery. As to this point, it was not much considered. Besides, the lease was in *præsenti*, and the party was let into possession, and had remained in for a considerable portion of the term. Here, it is true, the plaintiff was in actual possession at the time the void lease was granted: but there is no pretence for saying he was ever in possession *under that lease*. In Kent’s Commentaries, *112] 10th edit. Vol. 4, p. 580, the rule is stated *to be this:—“The measure of damages in actions on these personal covenants is regulated in some degree by the rule on the ancient warranty. At common law, upon voucher, or upon the writ of *warrantia chartæ*, the demandant recovered of the warrantor or heir other lands of equal value with the lands from which the feoffee was evicted. The value was computed as it existed when the warranty was made; so that, though the land had afterwards become of increased value, by the discovery of a mine, or by buildings, or otherwise, yet the warrantor was not to render in value according to the then state of things, but as the land was when he made the warranty. And, when personal covenants were introduced as a substitute for the remedy on the voucher and warranty, the estimated measure of compensation was not varied or affected. The buyer, on the covenant of seisin, recovers back the consideration money and interest, and no more. The interest is to countervail the claim for mesne profits, to which the grantee is liable, and is, and ought to be, commensurate in point of time with the legal claim to mesne profits. The grantor has no concern with the subsequent rise or fall of the land by accidental circumstances, or

with the beneficial improvements made by the purchaser, who cannot recover any damages either for the improvements or the increased value. This appears to be the general rule in this country. But, on the covenant of warranty, the measure of damages, in Massachusetts, Maine, Vermont, and Connecticut, is, the value of the land at the time of eviction, without regard to the consideration of the deed.^(a) In other *States, the measure of damages, on a total failure of title, even on the covenant of warranty, is, the value of the [*113 land at the execution of the deed; and the evidence of that value is the consideration money, with interest and costs." In *Sikes v. Wild*, 1 B. & S. 587 (E. C. L. R. vol. 101), real estate had been demised to the defendant in trust to sell, who put up part of it for sale, which the plaintiff agreed to buy, and was accepted as the purchaser. The defendant was aware that he could not make a title free from encumbrance, as by a marriage-settlement the land was vested in trustees to secure an annuity to the widow of the devisor, but he had [*114 *obtained from her a parol promise, that, in the event of the sale, she would transfer her security to another property. After the sale, the widow refused to assent to this, and the bargain went off in consequence. In an action by the plaintiff against the defendant for not completing the bargain, the jury found that the defendant bona fide believed that he would be able to make to the purchaser a good title free from encumbrance, and that he had reasonable grounds for so believing. It was held by Wightman, J., and Blackburn, J., dissentiente Cockburn, C. J., that the plaintiff, although entitled to recover his deposit, and the expenses of investigating the title, was not entitled to recover damages for the loss of his bargain. And this decision was unanimously affirmed by the Exchequer Chamber: 4 B. & S. 421 (E. C. L. R. vol. 116). In *Ireland v. Bircham*, 2 N. C. 90, 97, 2 Scott 207, where a lessee sued for a breach of a covenant for quiet enjoyment in a lease which was not to commence until more than a year after the commencement of the action, Tindal, C. J., said: "I do not feel that any answer has been given to the observation I have more than once thrown out, that the covenant under which the plaintiff

(a) The learned author refers to *Gore v. Brazier*, 3 Mass. Rep. 523; per Parker, J., in *Caswell v. Wendell*, 4 Mass. Rep. 108; *Bigelow v. Jones*, 4 Mass. Rep. 512; *Sweet v. Patrick*, 3 Fairfield 1; *Sterling v. Peet*, 14 Conn. Rep. 245; *Strong v. Shumway*, 1 D. Chapman's Rep. 110; *Park v. Bates*, 12 Vermont Rep. 381 (also in Mississippi, *Phipps v. Tarpley*, 31 Miss. (2 George) 433); and he adds,—“But, in *Sumners v. Williams*, 8 Mass. Rep. 163, 221, it was afterwards held, that, on the covenants with respect to title as to warranty, &c., the true measure of damages was the consideration-money and interest: *Byrnes v. Rich*, 5 Gray (Mass.) 518. This was formerly the rule also in South Carolina: *Liber v. Parsons*, 1 Bay's Rep. 19; *Guerard v. Rivers*, 1 Bay's Rep. 265; *Witherspoon v. Anderson*, 3 Dessaus. Rq. Rep. 245. But the rule is now settled in South Carolina according to the English common-law doctrine: *Henning v. Withers*, 2 Treadw. S. C. Const. Rep. 584; *Ware v. Weathnall*, 2 M'Cord's Rep. 413; *Bond v. Quattlebaum*, 1 M'Cord's Rep. 484, and statute of 1824. In Louisiana, the vendee, on eviction, is allowed to show the increased value of the land at the time of eviction above the original price, and that value, under certain qualifications, may form part of the damages: *Bissell v. Erwin*, 13 La. Rep. 143; *Weber v. Coussy*, 12 La. An. 534. Such increase only is allowed as the parties could have had in contemplation at the time of sale, and not the enormous increase produced from unforeseen or transient causes. In Ohio, the rule of damages for breach of covenants of seisin and quiet enjoyment, and of warranty of title, is the consideration-money and interest, with some exceptions; and, if he has enjoyed the rents and profits, it stops the claim for interest, so far as he is accountable over for those rents and profits: *Clark v. Farr*, 14 Ohio Rep. 118; *Lloyd v. Quimby*, 5 Ohio (N. S.) 262.”

sues is tied up to a covenant *for quiet enjoyment while the lease shall be in possession*. When the parties stipulate that the plaintiff and his assigns, paying the rent of 31*l.* 10*s.*, and observing the covenants entered into on his part, shall during the term demised quietly enjoy the premises, I cannot fail to observe that such a covenant is strictly conditional; that is, conditional for securing the plaintiff quiet enjoyment so long as he shall continue in possession of the land, and, as tenant, shall pay the stipulated rent. As he is not yet in possession, neither the covenant nor the condition can have any effect."

As to the 137*l.*, the allowance of 10 per cent., for compulsory sale, *115] has always been limited to the case of *land taken under the authority of an act of parliament for a railway or other public undertaking; it has never been extended to the case of an ordinary vendor and purchaser. In the cases where it is allowed, it is given as a sort of compensation for the inconvenience of looking for a fresh investment for the money. As to the 65*l.* expenses, the plaintiff must at all events have paid for *one* lease, and for that the defendant has paid 17*l.* into court; and a large portion of the remainder consists of fees to counsel and surveyors for consultations and opinions about this difficulty: these are never allowed. [The court intimating a doubt about this, it was arranged that this sum should be reduced by 20*l.*]

ERLE, C. J.—This was an action brought by the plaintiff to recover damages from the defendant, as executor of John Furze, deceased, for the breach of a covenant by the testator contained in a lease of certain premises in St. James's, that he, the lessee, his executors, &c., paying the rent and performing the covenants on his and their part to be paid, observed, &c., "should and might peaceably and quietly have, hold, use, occupy, possess, and enjoy the said piece or parcel of ground, messuage, &c., for and during the term of twenty-one years and twenty-one days, thereby granted as aforesaid, without the lawful let, suit, trouble, denial, interruption, molestation, or disturbance of or by the said John Furze (the testator), his heirs or assigns, or any of them, or any person or persons whomsoever lawfully claiming or to claim by, from, through, under, or in trust for him, them, or any of them." The breach assigned is, that, during the term, one Frances Vickers, then lawfully claiming the demised premises through and under the lessor, and having a good title to the same and to the possession *116] thereof through and *under him, claimed and demanded the said demised premises of, from, and against the plaintiff, and threatened to oust him from the possession and enjoyment thereof, and that, in consequence of that claim, the plaintiff was forced to accept a new lease for a shorter term and at a higher rent. The second plea is, that the plaintiff never had or entered into possession of the said demised premises under or by virtue of the said (first-mentioned) lease. The lease upon which the plaintiff's claim is founded was granted in the year 1860, to commence on the 4th of December, 1864; and the plaintiff had possession of the premises down to that day under a prior lease; therefore the lease in respect of which this action is brought was a reversionary lease conveying to the plaintiff only an *interesse termini*. In the sense of possession the plaintiff had it not *under that lease*. The allegation is, that the covenant was broken

by reason of the demand of Frances Vickers. The second plea, in the sense contended for by the plaintiff, is entirely irrelevant to the declaration, and bad on demurrer. The claim is in respect of an *interesse termini*; and there is no allegation, express or implied, in the declaration, that the plaintiff had entered into possession of the premises under that reversionary lease. Upon the demurrer to the second plea, therefore, I am of opinion that the plaintiff is entitled to judgment.

The fourth plea alleges that the said Frances Vickers did not claim or demand the said premises from the plaintiff, nor threaten to oust him from the possession or enjoyment thereof, as alleged. Now, upon the facts, it is clear that Frances Vickers had title under John Furze, and had a right to say that that lease was a nullity. She did say so, and asserted her right; and by reason of that demand the plaintiff lost the benefit of his *interesse termini*. It is clear, therefore, that the verdict for the plaintiff on that plea ought to stand. [*117]

The defendant has paid into court 417*l.*; and the remaining question is, whether that is the limit of the damages which the plaintiff is entitled to recover. It has been contended on the part of the defendant that the question is to be dealt with as if, instead of a covenant for quiet enjoyment, this had been a contract of sale, and to be governed by the rule of law which prevails in actions by vendee against vendor where the contract goes off by reason of the inability of the latter to make a good title; in which case he pays back the deposit and interest and the expenses to which the vendee has been put in the investigation of the title, and not damages for the loss of the bargain. I am of opinion that that contention is not sustainable. It is a known rule of law as to contracts of sale. It is the settled law founded upon numerous decided cases; and I believe that, in the case of contracts for the sale of property, the common convenience of mankind might justify it. Few vendors when they offer property for sale have any notion of the validity of their titles. But I think that rule is confined to contracts of sale, and that a line is to be drawn between a *contract* for the sale of land and a *conveyance* of an estate or interest therein. It is clear that, if there be a lease of land in possession, and the lessee enters under it, and is ousted or evicted by one against whose acts the lessor covenants, as here, the lessee is entitled to recover all he has lost, that is, the value of the term. It was held in *Williams v. Burrell*, 1 C. B. 402 (E. C. L. R. vol. 50), that a lessee under a void lease, who had been ejected by the successor of his lessor, was entitled, in an action against the executors for breach of the covenant for quiet enjoyment contained in the lease, to recover the value of the term which he had lost. That is the only decided case on the point which was adduced before us. But [*118] it is contended on behalf of the defendant, that, as this was a reversionary lease, conveying only an *interesse termini*, the parties stand in the relative position of vendor and vendee, and not of covenantor and covenantee. I am of opinion, however, that that distinction cannot be maintained. The lease conveyed to the plaintiff an *interesse termini*,—a term of twenty-one years. That interest vested in the plaintiff as a matter of right, so as to be assignable; and he was in possession. The covenant, therefore, is in perfect analogy to the

case of an instrument conveying a present term and a present interest, under which the lessee has entered. That being so, *Williams v. Burrell* decides that the ordinary rule shall apply, viz. that a party breaking his covenant must pay such damages as are the proximate consequences of his breach of covenant. The dicta cited from the American authorities are a neutral quantity; as many of the judges have laid down the rule one way as the other; and the two learned authors whose books are usually quoted do not sustain the defendant's argument. Mayne particularly limits his statement of that being the rule to the case where nothing has passed by the instrument which contains the covenant. Here, an *interesse termini* clearly passed. And, though Sedgwick says that in many parts of America the rule as contended for by the defendant prevails, he pretty clearly intimates that upon the whole his own opinion is the other way. There is no judgment which sustains that contention; and there is a distinct judgment of this court which is opposed to it. It is also negatived by the universal rule that one who breaks his contract must pay the damages proximately resulting from such breach. The plaintiff, therefore, in my judgment is entitled to the value of the term (which the jury have *119] given), and *also to the expenses to which he has legitimately been put in endeavouring to obtain it. But I think there should be certain deductions from the amounts given. The main and substantial deduction is the 137*l.*, which Mr. Garth's argument (though at first I must confess I did not understand the way it was intended to be put by him) has satisfied me that the plaintiff is not entitled to recover. The jury have calculated the value of the term upon the 6 per cent. tables, and have added 10 per cent. for compulsory sale,—making the 137*l.* If that was the intention of the jury, of which I believe there can be no doubt, they have clearly done wrong, and the plaintiff must lose the 137*l.* Then, a sum of 65*l.* was given for the expenses of the leases. Of this sum it is agreed that 20*l.* shall be deducted, as the amount of counsel's and surveyors' fees, which are never allowed. That reduces the amount to 45*l.* Then, it is said that, as the plaintiff must have incurred the expense of one lease, he is not entitled to recover the costs of both. To this objection I incline to yield, though I do not clearly see for which lease he is entitled to charge.^(a) Therefore I think 17*l.* must be deducted from the 45*l.* The result will be that the verdict will be reduced by 137*l.*, 20*l.*, and 17*l.*

BYLES, J.—I entirely agree with all that has fallen from my Lord. The main question is one of considerable importance, viz. as to how the damages are to be computed in an action for breach of a covenant for quiet enjoyment in a lease. It is plain, that, in the ordinary case of a contract for the sale of land by a written contract which is silent as to title, the law implies a contract for title. But that would operate *the greatest hardship in many cases. Suppose, for example, *120] a man had contracted to sell another a thousand acres of land in Northamptonshire, at 50*l.* an acre, receiving a deposit of 10 per cent., and it turned out that he had no title; and, land having risen in value, the purchaser were to claim compensation based upon the market value of the land at the time of the breach,—insisting that

(a) The natural thing would seem to be, that the plaintiff should pay for the lease under which he remained in possession of the premises.

he had a right to be placed in the same position as if the vendor had performed his contract. If such a claim could be enforced, the hardship would be manifestly great. The rule of law therefore in such case is,—and it is now firmly established,—that the purchaser is not to be placed in the position he would have been in if the vendor had performed his contract, but in the position he (the purchaser) would have been in if the contract had never been made; that is, he is entitled to a return of his deposit (with interest), and to any expenses he may legitimately have been put to in investigating the title, and to nominal damages, and no more. That is an anomalous rule, confined, for the sake of general convenience, to the case of vendor and purchaser. In all other cases of breach of contract, the measure of damages is, the loss the plaintiff has proximately sustained by reason of the breach of the defendant's contract. (a) It is here sought to apply that anomalous rule which obtains in the case of the contract which the law implies on a bargain for the sale of land, to the case of an express contract running with the land, and going to the end of the term,—the covenant for quiet enjoyment. As to authority, there is but one in this country which has any direct application, viz. *Williams v. Burrell*, 1 C. B. 402 (E. C. L. R. vol. 50). The then Lord Chief Justice,—one of the most eminent legal authorities by *whom [*121 this court has ever been presided over,—not only says that the plaintiff is entitled to recover “the value of the term lost,” but he adds, “the liability of the executor is too clear to require discussion.” Sir Thomas Wilde and my Brother Channell, who appeared as counsel for the defendant, did not venture to contest that that was the true measure of damages. I agree with my Lord as to the American authorities which have been adverted to. It is enough to say of them that they are equiponderant, and therefore weigh nothing in the scale either way. Then it is said this is only an *interesse termini*. Will that take the case out of the rule as to the measure of damages for the breach of a contract, the lessee being bound by the contract, and having entered into actual possession? An *interesse termini* is a marketable interest assignable at law. It seems to me to stand in this respect upon precisely the same footing as a term of which the grantee is entitled to present possession: both may be valueless for a few years. The same considerations, therefore, I conceive, apply to the one as to the other. There is another ground upon which probably the plaintiff would be entitled to recover the value of the term here, viz. that, on the authority of *Hopkins v. Grazebrook*, 6 B. & C. 31 (E. C. L. R. vol. 13), 9 D. & R. 22 (E. C. L. R. vol. 22), even in the case of a contract for the sale of land, the ordinary rule is to be applied, if the vendor at the time of the sale knew that he had no title. But two observations arise upon that. In the first place, *Hopkins v. Grazebrook* is spoken of with much dissatisfaction by Lord St. Leonards (*Vendors and Purchasers*, 13th edit. 301, 302): and, in the next place, if that case be law, it applies only where there is fraud,—*Omnia præsumuntur contra spoliatores*. Here, there is no suggestion that what was done was not done with perfect bona fides. As to the details of the deductions, I entirely agree with what has fallen from the Lord Chief Justice.

(a) See *Neill v. Whitworth*, 18 C. B. N. S. 435 (E. C. L. R. vol. 114), and *Borries v. Hutchison*, 18 C. B. N. S. 445.

*122] ***KEATING, J.**—I am of the same opinion. The judgment we are now pronouncing upon the main point involved in this case is undoubtedly of very great importance; and, as far as the argument has disclosed, it has never before arisen in Westminster Hall. The case which comes nearest to it is *Williams v. Burrell*, 1 C. B. 402 (E. C. L. R. vol. 50): but the distinction between that case and the present, is, that there there was an actual entry, whereas here the interest which the testator purported to convey was only an *interesse termini*. An *interesse termini*, however, is a well-defined interest. It is described in the notes to *Took v. Glascock*, 1 Wms. Saund. 250 g, n. (1), as one which the lessee may grant to another, and which passes to his executors or administrators, and of which in declaring he is properly described as being possessed. It is therefore something very different from a mere contract for the sale of land, not carried into execution by a conveyance. That seems to me to establish a line of distinction upon which we may safely act on the present occasion. There is no sound distinction between an *interesse termini* and an estate, where there has been an entry for a single day. Our judgment, therefore, proceeds on that ground, and on that ground only. I may observe that I do not found my judgment upon any distinction supposed to have been established by the case of *Hopkins v. Grazebrook*, 6 B. & C. 31 (E. C. L. R. vol. 13), 9 D. & R. 22 (E. C. L. R. vol. 22). That case has been reflected on by a very great authority: and, besides, the facts here do not, on consideration, seem to raise the principle upon which the decision in that case proceeded. There was something like legal fraud there. For these reasons, I concur with the rest of the court upon the main question which has been argued before us. I also agree that the damages should be reduced in the way suggested by my Lord.

*123] **MONTAGUE SMITH, J.**—I agree with the rest of the *court upon all the points. As to the main point,—the principle on which the damages are to be computed,—it is not intended to cast any doubt upon the rule established in *Flureau v. Thornhill*, 2 W. Bla. 1078, that, where a contract for the sale of land goes off for want of title in the intended vendor, the vendee is entitled to nothing for the loss of his bargain, but can only recover back the deposit, with interest, and the expenses he has been put to in the investigation of the title. That rule rests upon considerations which have no place here. Baron Parke, in *Robinson v. Harman*, 1 Exch. 850, 855, says: "The rule of the common law is, that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. The case of *Flureau v. Thornhill* qualified that rule of the common law. It was there held that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding, that, if he fail to make a good title, the only damages recoverable are, the expenses which the vendee may be put to in investigating the title. Here, however, the conveyance is not conditional on the lessor's having a good title. The conveyance has been made; and it passed the right and title to the term to the lessee, so far as the lessor had any to grant. There remains nothing to be done by the lessor. In contracts for the sale

of real estate, the courts have implied a contract for title, and have annexed to it the particular consequences which are to follow from a breach of the condition for title. But here we are dealing, not with a contract of sale, but with an actual grant, with an express covenant that the lessee shall have peaceable and quiet *possession and [*124 enjoyment of the premises during the term. The one is an executory contract, to which the courts have annexed certain implied conditions: but the other is the case of a contract fully executed, where nothing more remains to be done by the lessor, and where he has entered into an express covenant. The two cases are totally different: the covenantee, on breach, is entitled as in all other cases to full compensation for the loss he sustains. It is conceded, that, if the testator had lived until the 5th of December, 1864, and the plaintiff had remained in possession of the premises, the case would have fallen precisely within the case of *Williams v. Burrell*, where the value of the term was held to be recoverable. It has been urged that the consequences will be serious if we hold that the plaintiff is entitled to substantial damages here. But it is well known that the covenant for quiet enjoyment is limited to acts which the lessor is able to guard against, viz. his own acts and the acts of persons claiming under him. The lessor covenants that the lessee shall quietly enjoy, without molestation by himself or any person lawfully claiming by, through, or under him. The lessee is molested by or in consequence of an act of the covenantor himself, viz. his marriage-settlement. I agree that there are not facts to bring this case within *Hopkins v. Grazebrook*, 6 B. & C. 31 (E. C. L. R. vol. 13), 9 D. & R. 22 (E. C. L. R. vol. 22). Here, a right and title to the land passed. There is an express covenant by the lessor that the lessee shall have quiet enjoyment during the term. That covenant has been broken: and I think the lessee is entitled to full compensation for that which he has been deprived of. As to the other points, I also agree. It is plain that the jury first considered what was the market value of the term, and then added 10 per cent. for compulsory sale, by analogy to the case of a railway company taking land under the *compul- [*125 sory powers of an act of parliament. But this is not to be likened to the case of a compulsory sale. It was through the voluntary act or default of the testator that this covenant was broken. I also agree that the plaintiff is entitled to succeed on the demurrer to the second plea, on the ground that it is no answer to the action; it is not a traverse of anything that is either expressly or impliedly contained in the declaration.

Judgment for the plaintiff on the demurrer to the second plea.

Rule absolute to enter a verdict for the defendant on the issue on the second plea, and to reduce the damages by 137*l.* and 37*l.*

Garth, for the defendant, prayed leave to appeal on the main question.

ERLE, C. J., after consultation.—We think the defendant may have leave to appeal upon that point: but it should be presented definitely and divested of all extraneous matter.

Rule accordingly.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

Trinity Term,

IN THE

TWENTY-EIGHTH YEAR OF THE REIGN OF VICTORIA. 1865.

The Judges who usually sat in Banco in this Term, were,—

ERLE, C. J.,

BYLES, J., and

WILLES, J.,

MONTAGUE SMITH, J.

EVERETT and Another v. THE LONDON ASSURANCE.

May 30.

By the terms of a policy premises were insured against "such loss or damage as should or might be occasioned by fire to the property therein mentioned :"—Held, that this did not cover damage resulting from the disturbance of the atmosphere by the explosion of a gunpowder magazine a mile distant from the premises insured.

THIS is an action brought by the plaintiffs against the defendants for the recovery of 20*l.*, being the amount of damage occasioned to the plaintiffs' house under the circumstances hereinafter stated; and, by the consent of the parties, and by judge's order under the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court, without pleadings:—

1. By a policy of insurance, bearing date the 17th day of April, 1862, numbered 211,525, and sealed with the common seal of the defendants, for the considerations therein expressed, the defendants covenanted and agreed, that, subject to the terms therein mentioned, which had been duly complied with on the part of plaintiffs, the capital stock, estate, and securities of the defendants should be sub-
*127] ject and liable to pay, make *good, and satisfy unto the plaintiffs, their heirs, executors, or administrators, such loss or damage as should or might be occasioned by fire to the property of the plaintiffs therein mentioned and thereby insured, according to the

conditions and stipulations thereon endorsed, not exceeding in each case respectively the sum of 600*l*.

2. The premium is stated in the policy to be paid for the insurance of the property mentioned in the policy "from loss or damage by fire, according to the exact tenor of the conditions and stipulations endorsed" on the policy. A copy of the said policy and the conditions endorsed accompanied and was to be taken as a part of this case.

3. The 5th condition endorsed on the policy was as follows:—"That losses by lightning will be made good, where the property assured by the corporation has been actually set on fire thereby, and burnt in consequence thereof."

4. The 8th condition endorsed on the said policy was as follows:—"That books of account, manuscripts, written securities, money, bank-notes, bills, stamps, and gunpowder, will not be insured or comprehended in any insurance effected by or with this corporation, nor will any loss or damage in any case or of any description be made good when more than 25 lbs. weight of gunpowder shall be deposited or kept on the premises."

5. On the 1st of October, 1864, a large quantity of gunpowder in the gunpowder magazine of Messrs. Hall, at Erith, ignited, and exploded, but from what cause is unknown; and the before-mentioned premises of the plaintiffs were thereby injured to the extent of 20*l*.

6. The plaintiffs' premises, which are rather more than half a mile distant from the spot at which the explosion took place, were not set on fire by the explosion of the gunpowder; nor was any part thereof *burnt, heated, or scorched by the explosion. The injury [*128 they sustained consisted in the shattering of the windows and window-frames and the damaging of the structure generally by the atmospheric concussion caused by the explosion.

The question for the opinion of the court was, whether the damage so caused to the plaintiffs' premises was a loss or damage insured against under the before-mentioned policy.

If the court should be of opinion in the affirmative, then judgment was to be entered up for the plaintiffs for 20*l*. and costs of suit. If the court should be of opinion in the negative, then judgment of non-pros, with costs of defence, was to be entered up for the defendants.

Hannen (with whom was *Lush*, Q. C.), for the plaintiffs.(a)—By the terms of this policy, the defendants contract to indemnify the plaintiffs against such loss or damage as should or might be occasioned by fire to *the property of the plaintiffs therein mentioned and thereby [*129 insured. The words are general, and are not confined to fire on the premises. The conditions contain special provisions against the

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That, as the damage sustained by the plaintiffs was occasioned by the ignition of the gunpowder, it was damage occasioned by fire within the meaning of the policy:

"2. That the policy is general against all loss occasioned to the property by fire, and is not limited to loss occasioned by fire on the premises, and therefore that the fact that the gunpowder which exploded was at some distance from the plaintiffs' premises is immaterial:

"3. That the policy is not limited to damage arising from the premises being actually set on fire or burnt, except in the particular case of lightning, and therefore that in other cases damage of whatever kind occasioned by fire is within the policy:

"4. That damage resulting from the atmospheric concussion is as much occasioned by the fire as scorching, both of them being effects of the fire transmitted through and by the motion of the air."

indirect consequences of fire. As to gunpowder, the stipulation is,—
 “Gunpowder will not be insured or comprehended in any insurance effected by or with this corporation; nor will any loss or damage in any case or of any description be made good, when more than 25 lbs. weight of gunpowder shall be deposited or kept on the premises.” That is the limit of the reservation of liability in the case of gunpowder. So of the provision as to lightning. This is a contract which must, like all other mercantile contracts, be construed according to the ordinary sense of the words used. Suppose a fire take place in an adjoining house, and the premises or goods of the assured were damaged by water; or suppose an explosion of gas to take place in an adjoining house, and the premises of the assured to sustain damage therefrom; would not the company in either case be responsible as for an injury resulting from fire? The only difference between the case last put and the present, is, that the explosion which occasioned this damage occurred at a greater distance. The damage here is as certain and direct and immediate a consequence of fire, as the scorching the premises by the action of a fire happening on the other side of the street. The subject underwent discussion before Vice-Chancellor Page Wood in a case of *Taunton v. The Royal Insurance Company*, 33 Law J., Chan. 406, which arose out of the explosion of gunpowder on board the *Lotty Sleigh*, in the river Mersey.

*130] *Maude*, for the defendants.(a)—The short question *is whether damage resulting to the premises assured by an accidental explosion of gunpowder at a distance of a quarter of a mile therefrom, can be said to be a loss or damage occasioned by fire to the property insured, within the meaning of the policy. To bring the case within the words, it is submitted that the property insured must have sustained injury by the direct action of fire. The only injury here was a shattering of the premises by the atmospheric disturbance resulting from the explosion. Suppose the explosion had taken place under water, and by means of it the premises had been injured by water being thereby projected into them, could that have been said to be a loss or damage occasioned by fire? [WILLES, J.—Or suppose the house had been caused to sink into the earth by means of an explosion of fire-damp.] Or by an earthquake occasioned by fire in the bowels of the earth! Or, suppose, instead of an explosion of a powder-mill, this had been occasioned by the bursting of a locomotive, would that have been within the language of the policy? Or, would the shattering of the plaintiffs’ windows by the discharge of ordnance at a review be within the intention of the parties? All these suggestions show the difficulties which will arise from a departure from the plain meaning of the words. Some analogy may be drawn from the case of marine policies. In *Green v. Elmslie*, Peake 212, it was held, that, if a ship be driven by stress of weather on an enemy’s

(a) The points marked for argument on the part of the defendants were as follows:—

“1. That the damage caused to the plaintiffs’ premises was not a damage insured against by the policy in question:

“2. That, the plaintiffs’ premises having been only injured by the atmospheric disturbance caused by the explosion of gunpowder at a distance, and not having been in any way burnt, the damage complained of was not a loss or damage by fire:

“3. That fire was not the proximate cause of the loss in question.”

*coast and there captured, it is a loss by capture, and not by the perils of the seas. So, in *Ionides v. The Universal Marine Insurance Company*, 14 C. B. N. S. 259 (E. C. L. R. vol. 108), where a vessel the cargo of which was insured under a policy warranted "free from capture, seizure, and detention, and all the consequences thereof, or of any attempt thereat, and free from all consequences of hostilities, riots, or commotions," was wrecked off Cape Hatteras, in consequence of the master having mistaken his course through the removal of a light by the confederates during their recent conflict with the federal states of America—it was held that the *proximate* cause of the loss was a peril of the sea, and not the hostile act of the confederate troops in extinguishing the light, and therefore not within the exception. The condition as to lightning materially aids this contention. It is that "losses by lightning will be made good, where the property assured by the corporation *has been actually set on fire thereby, and burnt in consequence thereof.*" For a mere injury by lightning, unaccompanied by fire, the corporation would not be liable. In *Marshall on Insurance*, Vol. 2, Book IV., (a) p. 790 (edit. 1823), it is said that "by the terms of the usual policy, the insurers undertake to pay, make good, and satisfy to the insured all loss or damage which may happen by fire during the term specified in the policy to the houses or other buildings, furniture, or merchandise insured. In order, therefore, to bring the loss within the risk insured against, it must appear to have been occasioned by actual *ignition*; and no damage occasioned by mere *heat*, however intense, will be within the policy. Thus, in *Austin v. Drewe*, 6 Taunt. 436, 2 Marsh. 130, a policy was effected against loss or damage by fire, on the stock of a sugar-house. In an action on the policy, it appeared that the *sugar-house consisted of eight stories, in each of which there was sugar in a [*132 certain stage of preparation; that heat was communicated to each story by a chimney, at the top of which was a register which was usually shut at night after the fire was out, for the purpose of retaining the heat; that, on the present occasion, the fire was lighted in the morning, but the register was negligently kept shut, whereby the building was filled with smoke and sparks, and the sugar damaged, not by the smoke, but by the excessive heat; but *nothing took fire*. The court held that the loss arose from the mismanagement of the machinery, and not from any of those accidents from which the policy was intended to protect the assured; and therefore that the plaintiffs were not entitled to recover." [WILLES, J., referred to *Dixon v. Sadler*, 5 M. & W. 405.]

ERLE, C. J.—I am of opinion that our judgment should be for the defendants. The question is, as put by Mr. Maude, what is the meaning of the parties to this contract, to be gathered from the instrument itself and the surrounding circumstances. The terms of the contract are these,—“The capital stock, estate, and securities of the said corporation shall be subject and liable to pay, make good, and satisfy unto the said assured, their heirs, executors, or administrators, such loss or damage as shall or may be occasioned by fire to the property hereinbefore mentioned and hereby insured.” The damage which accrued to the premises of the plaintiffs here was occasioned by a con-

(a) This book is omitted from Serjt. Shée's edition of 1861.

cussion or disturbance of the atmosphere by an explosion of a large quantity of gunpowder at a magazine about half a mile distant from them. Taking the words of the contract according to their plain and ordinary understanding, I am of opinion that they do not apply to *133] such loss or damage as that. The stipulation as to *lightning, —“that losses by lightning will be made good, where the property assured by the corporation has been actually set on fire thereby, and burnt in consequence thereof,”—and the condition as to gunpowder, lead me irresistibly to the conclusion that the parties did not contemplate that the policy was to cover a damage occasioned as this was. And I think the manifest and fair intention of the parties will be carried out by holding that the plaintiffs are not entitled to recover.

WILLES, J.—I am of the same opinion. We are bound to look to the immediate cause of the loss or damage, and not to some remote or speculative cause. Speaking of this injury, no person would say that it was occasioned by fire. It was occasioned by a concussion or disturbance of the air caused by fire elsewhere. It would be going into the causes of causes to say that this was an injury caused by fire to the property insured. The rule “*In jure non remota causa, sed proxima spectatur*,” determines this case.

BYLES, J.—I am of the same opinion. The expression in the policy which we have to construe, is, “loss or damage occasioned by fire.” Those words are to be construed as ordinary people would construe them. They mean loss or damage either by ignition of the article consumed, or by ignition of part of the premises where the article is: in the one case there is a loss, in the other a damage, occasioned by fire. Lord Bacon says: (a) “It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts *134] by that, without looking to any *further degree.” If that were not so, a ship in the neighbourhood of Mount Etna or Vesuvius during an eruption, and receiving damage from substances projected therefrom, might be said to be damaged by fire. So, a shot falling amongst crockery-ware might in one sense be said to occasion a loss by fire. But neither of these cases would fall within these words, which must be understood in their plain and ordinary sense.

MONTAGUE SMITH, J., having advised on the case when at the Bar, took no part in the discussion. Judgment for the defendants.

(a) *Maxims of the Law*, Reg. 1. *Bacon's Works*, by Basil Montagu, Vol. 13, p. 145.

SCOTT, Chamberlain of the City of LONDON, v. JACKSON. May 30.

The dealing in or buying and selling for reward of shares in English or foreign joint stock banks or companies, or the debt, stock, or securities of foreign governments, is an acting and assuming to act as a broker, within the 57 G. 3, c. 60.

THIS was an action brought by the Chamberlain of the city of London against the defendant, for acting as a broker without being duly admitted.

The first count of the declaration stated that the defendant, before

the commencement of this suit, and after the 27th of June, 1817, to wit, on the 22d of February, 1864, within the said city and liberties thereof, did take upon himself to act as a broker within the said city and liberties, and as a broker within the said city and liberties did for reward to himself in that behalf sell for one Elise Bernal to a certain other person whose name is to the plaintiff unknown, a certain interest or shares, to wit, three transferable shares, of and in the capital or joint-stock of and belonging to a certain company, commonly called The Mercantile Credit Association (Limited), being a body corporate, contrary to the form of the statutes in *that case made and provided; he the defendant not having been before or at [*135 the time of such sale admitted by the Court of Mayor and Aldermen of the said city of London to be or act as a broker within the said city and liberties; whereby and by force of the statutes in such case made and provided the defendant had forfeited for his said offence, to the use of the mayor and commonalty and citizens of the said city the sum of 100*l.*, and thereby and by force of the statutes in that case made and provided an action had accrued to the plaintiff, as such chamberlain as aforesaid, to demand and have of and from the defendant the said sum of 100*l.*, and the defendant had not paid the said sum, or any part thereof.

The second count was for a like penalty for acting as a broker in the sale of shares in the East Bassett Mining Company; the third for a like penalty for acting in the sale of Mexican Bonds; and there were twenty other counts charging similar sales of shares in various foreign stocks and railway and mining and banking companies.

The defendant pleaded, not guilty, by statute,—the statute referred to in the margin being the 21 Jac. 1, c. 4, s. 4.

He also demurred to the declaration, the ground of demurrer stated in the margin being, “that the dealing in the shares of companies and the debts of foreign governments was not acting as a broker within the meaning of the statutes referred to.” Joinder.

J. Brown, Q. C., in support of the demurrer.(a)—The question is

(a) The points marked for argument on the part of the defendant were as follows:—

“1. That the defendant did not in any of the transactions mentioned in the declaration act as a broker within the meaning of the statutes referred to:

“2. That the statutes relied on are confined to brokers employed in the buying and selling of goods; and this is to be inferred from the duties raised being given as a compensation for the abolition of an office relating to the sale of goods:

“3. That, if the meaning of the word broker is enlarged by the contemporaneous statutes in *pari materia*, it does not go beyond brokers employed in the purchase and sale of public and joint stock, *i. e.*, the National Debt of the United Kingdom, and brokers employed in the exchange of moneys:

“4. That a broker employed in the sale of shares in a company, is an agent who negotiates the transfer in a partnership, and not a broker within the acts:

“5. That a broker employed in the sale of the debt of a foreign government negotiates the transfer of the debt of such government and the investment of money, and is not a broker within the acts:

“6. That such debt not being public stock or securities within the Stock Jobbing Acts on which the plaintiff relies, the defendant was not a broker within those acts or the acts declared on:

“7. That the subject-matter of such sales not being within the city, the defendant was not a broker within the city acts:

“8. That the demurrer is not too large:

“9. That it is distributive.”

*186] whether one who buys or sells for others *for reward shares in British joint-stock companies, or foreign stock, is a broker within the statute 57 G. 3, c. 60. That statute recites, amongst other things, that, by the 6 Anne, c. 16, intituled "an act for the well garbling of spices, and for granting an equivalent to the city of London by admitting brokers, after reciting that "the office of garbler was part of the revenues of the city of London, and was then let by lease to William Stewart, under the rent of 300*l.* per annum, the profits of which office and the right of the said William Stewart to the same by repealing the said act would be very much diminished,"—it was enacted, that, from, &c., "all persons that should act as brokers within the city of London and liberties thereof should from time to time be

*187] admitted so to do by the Court of *Mayor and Aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behaviour as that court should think fit and reasonable, and should upon such their admission pay to the chamberlain of the said city for the time being, for the uses therein and hereinafter mentioned, the sum of 40*s.*, and should also yearly pay to the said uses the sum of 40*s.* upon the 29th of September in every year:" and, after directing the application of the money (amongst other things to pay a compensation to Stewart), it was further enacted, "that, if any person or persons should take upon him to act as a broker, or employ any other under him to act as such within the said city and liberties, not being admitted as aforesaid, every such person so offending should forfeit and pay to the use of the said mayor, &c., for every such offence, the sum of 25*l.*" The statute then proceeds to enact "that all persons that from and after the 1st of July next after the passing of the act, should be admitted to act as brokers within the city of London and liberties thereof by the Court of Mayor and Aldermen of the said city for the time being, in pursuance of the recited act,—should upon such their admission, over and above the sum of 40*s.* required to be paid by the recited act, pay to the chamberlain of the said city for the time being the sum of 3*l.*, and should also yearly pay to the said chamberlain, over and above the yearly sum of 40*s.* required to be paid by the recited act, the sum of 3*l.* on the 29th of September in every year.' The 2d section repeals the penalty imposed by the recited act, and enacts, that, "from and after the passing of this act, if any person shall take upon him to act as a broker, or employ, or cause, permit, or suffer any person or persons to be employed with, under, or for him, to act as such within the said city and liberties, not being admitted in pursuance of the said *recited act, every such person so offending

*138] shall forfeit and pay to the use of the mayor and commonalty and citizens of the said city for every such offence the sum of 100*l.*, &c. *Primâ facie* one would assume that "brokers" meant persons engaged in buying and selling goods for others,—ordinary articles of commerce. The subject was elaborately argued in *Clarke v. Powell*, 4 B. & Ad. 846 (E. C. L. R. vol. 24), where the court came to the conclusion that those persons only came within the description of brokers in the act who were so considered at the time of the passing of the statute of Anne. [*Archibald* referred to *Smith v. Lindo*, 4 C. B. N. S. 395 (E. C. L. R. vol. 93), where this court held that a dealer (in

London) in shares in a public company (whether British or foreign) is a "broker" within the statute of 6 Ann. c. 16, and incapable of suing for commission, unless duly licensed.] That case certainly seems to be directly in point; and it will be for the court to say whether the matter is open to me to argue otherwise than in a court of error. [MONTAGUE SMITH, J.—The decision of this court was affirmed on error: 5 C. B. N. S. 587.] The point now before the court seems to have been tacitly abandoned there.

Archibald (with whom was *Lush*, Q. C.), was to have argued for the plaintiff.(a)

*WILLES, J.—It is impossible to get over the case of *Smith v. Lindo*, at least in this court. There must, therefore, be judgment for the plaintiff. [*139]

The rest of the court concurring, Judgment for the plaintiff.

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That, in the transactions and dealings respectively mentioned and described in each count of the declaration, the defendant acted as a broker, and took upon him to act as such within the meaning of the statutes 6 Anne, c. 16, and 57 G. 3, c. 60, and, not having been duly admitted by the Court of Mayor and Aldermen of the city, rendered himself liable to each of the several penalties claimed:

"2. That, by the explanation of the term 'broker' to be gathered from the 1 Jac. 1, c. 21, the 8 & 9 W. 3, c. 20, s. 60, and the 8 & 9 W. 3, c. 32, and other acts which are in pari materia with the 57 G. 3, c. 60, it appears that the dealing in or buying and selling for reward of the shares or securities of English or foreign companies, or the debt, stock, or securities of foreign governments, is an acting and assuming to act as a broker within the meaning of the said last-mentioned statute:

"3. That the term 'broker,' in the statute 57 G. 3, c. 60, applies to all persons dealing in or buying and selling for reward on behalf of others stocks, shares, or securities similar to those dealt in by brokers at the time when that act was passed, although such stocks, shares, or securities were not then in existence:

"4. That the declaration is good in substance, and the demurrer too large."

The term broker, derived from a word signifying to use, employ, implies agency. This was of the same nature as that of the Roman *procurator inter amicos et vendentes est conciliator et medius*—*Calv. Lex. Jur.*,—he who brings about a bargain between two merchants or others for a commission: *Story on Agency*, § 28; *Story on Sales*, § 65; 7 *Wentw. Plead.* 332; 5 *Dutch.* 341; 7 *Tiff.* 417; *Acts of Assembly, Penna., Purd. Dig.* 126; *Int. Revenue Act 1866*; 2 *Rev. Stat. Ohio* 1461. 1. There is no bailment to a broker; he has no ownership in or lien on the goods bargained for, nor a right to take the price: 2 *Kent Com.* 622 (b); *Russell on Factors* 91; 7 *Tiff.* 417. In this he differs from an auctioneer, a factor, and a pawnbroker. 2. He can only make a private sale, —the auctioneer a public one: 40 *Barb.* 654; *Dunlap, Paley on Agency* 13, n.

3. He cannot sell on credit. 4. He cannot contract in his own name directly with the person to whom he sells or of whom he buys. 5. As soon as the bargain is made, his duty is fulfilled, and his right to brokerage matures: 5 *Dutch.* 341; 34 *Barb.* 93; 21 *Id.* 145; 43 *Id.* 529; although this may be modified by the usage of trade: *Br. R.* 76.

The several classes of brokers are distinguished by the articles they deal in, as stock and bill (or street): 1 *Jones (Penna.)* 468; merchandise, insurance, custom-house, ship, or real estate brokers: *Purd. Dig.* 126.

When brokers use their character as such to buy and sell on their own account (which was forbidden by stat. 3 *Geo. 2*, s. 31), they are taxable as if the operation were done on another's account: *United States v. Cutting*, 3 *Wall. (U. S. Sup. Ct. 1865)* 441; *Int. Rev. Acts U. S.*; *Maryland Code* 381.

HORROCKS v. THE METROPOLITAN RAILWAY COMPANY.*June 1.*

The plaintiff having given notice to the defendants, a railway company, under the 68th section of The Lands Clauses Consolidation Act, 1845, that his premises had been injuriously affected by the execution of their works, and that he demanded compensation and an assessment before a jury, the defendants issued their warrant, and a jury was summoned, who found that the plaintiff was not entitled to any compensation. The plaintiff thereupon obtained a rule in the Queen's Bench to quash the inquisition and the verdict and judgment thereon, and gave the company a fresh notice, and, the company not issuing another warrant, the plaintiff brought this action:—Held, that, the original warrant remaining unimpeached, the sheriff was bound to go on under it, by summoning a fresh jury, and that the company were in no default.

THIS was an action against the Metropolitan Railway Company to recover a compensation for land injuriously affected by their works, under the 68th section of The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18.

*140] The declaration stated, that the defendants were a *railway company incorporated by an act of parliament passed in the seventeenth and eighteenth year of the reign of Queen Victoria, intituled "An Act to alter and extend the North Metropolitan Railway, and to consolidate and amend the provisions relating thereto (17 & 18 Vict. c. ccxxi.), and that the plaintiff was entitled to compensation in respect of an interest in a certain house and premises situate and being No. 66, Euston Road, in the parish of St. Pancras, in the county of Middlesex, which had been injuriously affected by the defendants as and being the promoters of the undertaking, by the execution of the works of the said railway, and that the defendants, as such promoters as aforesaid, had not made satisfaction to the plaintiff in respect of his interest in the said house and premises under the provisions of the said act or of any act incorporated therewith, and the compensation claimed by the plaintiff in respect of his interest in the said house and premises exceeded the sum of 50*l.*; and that the plaintiff, desiring to have the said compensation settled by a jury, gave notice of such his desire to the defendants as such promoters as aforesaid, stating in the said notice the nature of his interest in the said house and premises in respect of which he claimed compensation, and the amount of compensation so claimed by him, being 489*l.* 6*s.* 10*d.*, that is to say, 148*l.* 15*s.* 4*d.*, the amount of repairs done to the said premises, and of the architect's charges in reference thereto, and 340*l.* 11*s.* 6*d.* for loss of trade, damage done to the goodwill, and business value of the said house as a public-house, depreciation in value of stock-in-trade, damage done to stock in cellars, and legal and other expenses which the plaintiff had been put to; that the defendants, as such promoters as aforesaid, were not willing to pay the amount of the compensation so claimed, nor did they enter into a

*141] *written agreement for that purpose, nor did they within twenty-one days after the receipt of the said notice issue their warrant to the sheriff to summon a jury for settling the same in the manner provided by law; that, by reason of such default to issue their warrant as aforesaid, the defendants became and were liable to pay to the plaintiff, being so entitled as aforesaid, the amount of compensation so claimed by him as aforesaid; and that all conditions

were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action, yet that the defendants had not paid the said amount of compensation to the plaintiff: Claim, 500*l*.

The defendants pleaded,—first, that the plaintiff was not entitled to compensation as alleged,—secondly, that the said interest of the plaintiff in the said house and premises had not been injuriously affected by them the defendants, as alleged,—thirdly, that the plaintiff did not give to them, the defendants, such notice as alleged.

The fourth plea stated, that, after the said interest of the plaintiff in the said house and premises had been injuriously affected by them the defendants, as and being the promoters of the said undertaking, by the execution of the works of the said railway, as alleged, and after the plaintiff became and was entitled to compensation in respect of the said interest having been so injuriously affected, as alleged, and long before the giving of the notice in the declaration mentioned, the plaintiff, desiring to have the said compensation settled by a jury, gave notice of such his desire to the defendants, as such promoters as aforesaid, stating in the said last-mentioned notice the nature of his interest in the said house and premises in respect of which he claimed compensation, and the amount of compensation so claimed by him, and that *such claim was made and such notice given by the plaintiff for and in respect of the same compensation as that [*142 mentioned or referred to in the said notice in the declaration mentioned; that thereupon the defendants, as such promoters as aforesaid, not being willing to pay the amount of compensation claimed by such notice, did within twenty-one days after the receipt of such notice duly issue their warrant under their common seal, directed to the sheriff of the county of Middlesex, he being under the provisions of The Lands Clauses Consolidation Act, 1845, the proper officer in that behalf, requiring him to summon a jury for settling the said compensation in the manner provided by The Lands Clauses Consolidation Act, 1845, in that behalf, and delivered the said warrant to the said sheriff; and that the said warrant had thenceforth been, and at the time of the giving of the said notice in the declaration mentioned continued to be, and still was, in the hands of the sheriff for the said county of Middlesex, and was still unexecuted and in full force and effect.

The plaintiff replied to the fourth plea, that, upon the receipt of the warrant in the said fourth plea mentioned by the sheriff of the county of Middlesex, the said sheriff did in pursuance of the said warrant summon a jury for settling the said compensation in the manner provided by The Lands Clauses Consolidation Act, 1845, to meet at the house known by the name of the Sheriff's Office in Red Lion Square, in the said county of Middlesex, which house is not more than eight miles distant from the said house and premises of the plaintiff, on the 8th of January, 1862, which day was a time not less than fourteen nor more than twenty-one days after the receipt of the said warrant by the said sheriff; that the said sheriff forthwith gave notice to the defendants of the time and place so *appointed by the said sheriff; that, on the said day, at the said place, the [*143 plaintiff and the defendants came by their respective attorneys before

the said sheriff, and also at that same time and place the said jury came, and the said jury, being duly called, and sworn truly and faithfully to inquire of and assess the compensation (if any) in respect of which their verdict was to be given, did on their oath aforesaid say by their verdict that there was not at any time, nor was there at the time of holding the said inquisition, any compensation to be paid by the defendants to the plaintiff in respect of the said house and premises or the plaintiff's interest therein having been or being injuriously affected by the execution of the works of the defendants, as alleged in the plaintiff's said notice and claim; that the said sheriff duly gave judgment thereon; that the said verdict and judgment was duly signed by the said sheriff; and that thereupon certain proceedings were had on the part of the plaintiff in Her Majesty's Court of Queen's Bench at Westminster, and it was ordered by the said court that a writ of certiorari should issue to remove into the said court the said inquisition, verdict, and judgment; and afterwards it was further ordered by the said court that the said inquisition, and the verdict and judgment given thereon, should be quashed; and that after the said warrant had been so executed as aforesaid, and the said inquisition, verdict, and judgment had been so quashed as aforesaid, and not before, the plaintiff gave to the defendants the notice in the declaration mentioned.

The plaintiff also demurred to the fourth plea, the ground of demurrer stated in the margin being, "that it is not alleged in the said fourth plea that the twenty-one days mentioned in the 41st section of The Lands Clauses Consolidation Act, 1845, have not *144] elapsed, or that the warrant remains in the sheriff's hands and is unexecuted, by the consent of the parties interested." Joinder.

The defendants rejoined to the second replication to the fourth plea, that the said inquisition was not duly held, and the said verdict and judgment were respectively not duly given; and that the said inquisition, verdict, and judgment, were quashed as in the said fourth plea mentioned, for the cause that the same were respectively not duly held and given as aforesaid, and for no other reason or cause.

The defendants also demurred to the second replication to the fourth plea, the ground of demurrer being, "that the replication shows that the warrant never was duly executed by the sheriff, and alleges no sufficient reason why the same should not now be executed by him, or why the defendants should issue any further or other warrant." Joinder.

The plaintiff joined issue and demurred to the rejoinder to the second replication, the grounds of demurrer being, "that it is not alleged that the sheriff did not duly summon a jury in pursuance of the said warrant, or shown that the sheriff had power or authority to summon a second jury under the said warrant." Joinder.

Francis (with whom was *Lush*, Q. C.), for the plaintiff.(a)—The

(a) The points marked for argument on the part of the plaintiff, were as follows:—

"1. That the fourth plea is bad, because it is not alleged therein that at the time of the giving of the notice in the declaration mentioned the twenty-one days mentioned in the 41st section of the Lands Clauses Consolidation Act, 1845, had not elapsed, or that the warrant remained in the sheriff's hands, and was and is unexecuted, by the consent of the parties interested; and because it is not alleged or shown, that, at the time of the giving of the said notice, the sheriff had power or authority to execute the said warrant by summoning a jury, or that

fourth plea is bad, or, if good, the *replication is a sufficient answer thereto. It appears on the record that the plaintiff [*145 gave notice under the 68th section of The Lands Clauses Consolidation Act, 1845, that his premises had been injuriously affected by the execution of the defendants' works, and that he claimed compensation. It thereupon became the duty of the company, under s. 39, to issue their warrant to the sheriff to summon a jury to determine the amount of compensation due, and that of the sheriff, under ss. 41, 42, to summon and impanel a jury, not less than fourteen or more than twenty-one days after the receipt by him of the warrant. The proceedings under the former warrant having been quashed, and there being no provision in the act for the issuing of a second warrant or the impanelling of a second jury,—seeing that the sheriff can do nothing after the lapse of the twenty-one *days,—the plaintiff was clearly [*146 right in giving a fresh notice. [BYLES, J.—You say, that, if the sheriff had power to summon another jury, the plaintiff is entitled to avail himself of the old notice; and if not, that he may rely on the new notice?] Precisely so. It would seem from the conclusion of the case of *The Queen v. The North Western Railway Company*, 3 Ellis & B. 443, 476 (E. C. L. R. vol. 107), that the warrant is still in force. [BYLES, J.—The warrant standing, have you a right to give the company a fresh notice?] The time limited for the sheriff to act upon the warrant being gone, he can do nothing. [BYLES, J.—The time for proceeding on the warrant must necessarily be enlarged. Suppose the sheriff were to die on the twentieth or twenty-first day, after the inquisition had been begun,—what would be the result? Must you begin de novo?] It is submitted that we must.

H. Lloyd (with whom was *Hawkins*, Q. C.), contra.(a)—The defendants' construction is reasonable, and in accordance with the language of the statute. [He was stopped by the court.]

ERLE, C. J.—The company make no objection to the *sheriff's [*147 going on under the old warrant. The 41st section of The Lands Clauses Consolidation Act, 1845, gives a direction to the sheriff which is obligatory on him: he is, not less than fourteen nor more than

the plaintiff could compel him to do so; and because the said plea alleges no sufficient reason why the plaintiff was not at liberty to give the said notice in the declaration mentioned, or why the defendants should not have issued another or further warrant in pursuance thereof:

"2. That the fourth plea, if good, is sufficiently answered by the second replication, which shows that the said warrant was in fact duly executed by the sheriff, and that the plaintiff was legally justified in giving the notice in the declaration mentioned, and alleges a sufficient reason why the said warrant should not now be executed by the sheriff, and why the defendants should have issued a further or other warrant in pursuance of the said notice:

"3. That the rejoinder to the second replication is bad, because it is not alleged or shown therein that the sheriff did not duly summon a jury in pursuance of the said warrant, or that he had power or authority to summon another or further jury under the said warrant, or without a fresh warrant issued to him for that purpose; and because no sufficient reason is alleged why the plaintiff should not have given the notice in the declaration mentioned."

(c) The points marked for argument on the part of the defendants were as follows:—

"1. That the plaintiff was not entitled under s. 68 of The Lands Clauses Consolidation Act, 1845, to give the company a second notice, or to require them to issue a second warrant, but should have applied to the sheriff to execute the warrant already issued to him and in his hands:

"2. That the warrant already issued never had been duly executed, and was in no way invalidated, and might and should have been executed:

"3. That, for these reasons, the fourth plea is good, the plaintiff's second replication thereto is insufficient, and the defendants' rejoinder thereto is good."

twenty-one days after receiving the warrant, to summon a jury for settling any case of disputed compensation. But, if his attempts to do his duty are frustrated by the order of a superior court, he ought to go on again as if no such difficulty had arisen. I think he may summon a fresh jury under the authority conferred upon him by the warrant already issued, and consequently that the defendants' fourth plea is an answer to the action.

WILLES, J.—I am of the same opinion. The sheriff is in substance made the judge in this matter: and by s. 44, if he "make default in any of the matters thereinbefore required to be done by him in relation to any such trial or inquiry, he shall forfeit 50*l.* for every such offence, and such penalty shall be recovered by the promoters of the undertaking, by action in any of the superior courts." The neglect of the sheriff, however, does not interfere with the rights of the parties.

BYLES, J.—I am of the same opinion.

MONTAGUE SMITH, J.—I am of the same opinion. This is an action brought on the 68th section of The Lands Clauses Consolidation Act, 1845, which provides that, if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in *148] such case shall exceed the sum of *50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit: and, if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall within twenty-one days after the receipt of such notice issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and, in default thereof, they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, to be recovered by action, &c. Here, the claimant gave the company notice under that section, and they duly issued their warrant to the sheriff, by whom an inquisition was held; and the jury found that the claimant was not entitled to any compensation. By the act of the claimant, that inquisition was afterwards set aside. The twenty-one days mentioned in s. 41 having now elapsed, the question is, what is the proper course to be pursued. As between the parties, the statute is clearly directory. The inquisition and the verdict and judgment thereon have been set aside: but the warrant remains, and that with the plaintiff's consent. There is no provision in the clause to justify the plaintiff in beginning again by giving a fresh notice. It would be a strong thing to allow that: he might vary his claim in the new notice. The most reasonable construction, as it seems to me, is that the original notice and warrant remain, and the sheriff must go on again under it.

Judgment for the defendants.

***THE BROMPTON, CHATHAM, GILLINGHAM, AND
ROCHESTER WATERWORKS COMPANY v. JEN- [*149
NINGS. June 1.**

A stipulation in a composition deed under the 192d section of the Bankruptcy Act, 1861, that it shall be lawful for the trustees to require any person or persons claiming to be a creditor or creditors of the debtor to verify the nature and amount of such debt or claim, with full particulars showing the consideration thereof, by statutory declaration before the commissioners of bankruptcy, or otherwise, as the said trustee or trustees may think fit,—is unreasonable, and renders the deed inoperative as against a non-assenting creditor.

THIS was an action for goods sold and delivered, goods bargained and sold, and work and labour, &c.

The defendant pleaded, that, after the accruing of the plaintiff's claim, and after the 11th of October, 1861, the defendant was indebted to the plaintiffs and divers other persons; and thereupon a deed, bearing date the 23d of December, 1864, was made and entered into by and between the defendant of the first part, and J. Berridge, W. Haymen, and J. H. Ivey, as and being trustees on behalf of *all the creditors* of the defendant of the second part, and the several persons whose names and seals were thereunto subscribed, being creditors of the defendant, *on behalf of themselves and all the creditors of the defendant* so far as they had power to bind them, of the third part, relating to the debts and liabilities of the defendant and his release therefrom; and the defendant thereby conveyed and assigned all his estate and effects (except wearing apparel) to the said trustees, Upon trust for the benefit of *all the creditors* of the defendant in manner therein mentioned; and the said creditors thereby severally and respectively released and discharged the defendant from all debts and liabilities of the defendant to the said creditors respectively, and from all actions and suits in respect thereof: Averment, that a majority in number representing three-fourths in value of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards did in writing assent to and approve of the said deed; and the said trustees appointed by the said deed executed the same; and the execution of the said deed by the defendant was *attested by an attorney, [*150 and within twenty-eight days from the day of the execution of the said deed by the defendant the same was produced and left, having been first duly stamped, at the office of the chief registrar of the Court of Bankruptcy, for the purpose of being registered, and, together with such deed, there was delivered to the said chief register an affidavit by the defendant that a majority in number representing three-fourths in value of the creditors of the defendant whose debts amounted to 10*l.* and upwards had in writing assented to and approved of the said deed, and also stating the amount in value of the property and credits of the defendant comprised in the said deed; and the said deed did before the registration thereof bear such ordinary and ad valorem stamp-duties as were provided by the Bankruptcy Act, 1861, in that behalf; and immediately on the execution of the said deed by the defendant possession of all the property comprised therein of which the defendant could give or order possession was given to the said trustees; and at the time of the execution of the said deed the plaintiffs were creditors of the defendant in respect

of the claim herein pleaded to, within the meaning of the Bankruptcy Act, 1861; and that, all conditions having been performed, and all things having happened necessary in that behalf, the plaintiffs became and were and are bound by the said deed as if they had been parties thereto and had duly executed the same.

To this plea the plaintiff replied that the said deed first in that plea mentioned was and is to the tenor and effect and in the words and figures following, that is to say,—“This indenture, made the 23d of December, 1864, Between Stephen Jennings, of, &c., builder and contractor, of the first part, J. Berridge, of, &c., W. Haymen, of, &c., and J. H. Ivey, of, &c., who, and the survivor of them, and the trustees or trustee for *the time being are hereinafter referred to as *151] “the said trustees or trustee” of the second part, the several persons, companies, and copartnership firms whose names and seals are hereunto subscribed and affixed, being creditors of the said Stephen Jennings, *on behalf of themselves and all the creditors of the said Stephen Jennings so far as they have power to bind them*, of the third part: Whereas, the said Stephen Jennings has for some time past carried on the business of a builder and contractor at Rochester, in the county of Kent: And whereas the said Stephen Jennings is indebted to the several persons parties hereto of the third part in divers sums of money which he is unable to pay in full: And whereas, at a meeting of the creditors of the said Stephen Jennings, held on the 21st of December, 1864, at, &c., it was resolved by the creditors present thereat that the said Stephen Jennings should assign all his estate and effects to the parties hereto of the second part, *for the benefit of all the creditors of the said Stephen Jennings*: And whereas, the said several parties to these presents have agreed to carry out the said resolution by the execution of these presents, with such covenants and provisions as hereinafter contained: Now this indenture witnesseth, that, in consideration of the premises, and of the said agreement, the said Stephen Jennings doth hereby grant, bargain, sell, assign, transfer, and release unto the said J. Berridge, W. Haymen, and J. H. Ivey, their heirs, executors, administrators, and assigns, All the real estate, chattels real, stock-in-trade, household-furniture, plant, machinery, fixtures, debts, securities for money, books of account, vouchers, and other documents in writing, and all other the real and personal estate of the said Stephen Jennings, except wearing apparel, with full power to enter into the messuages or tenements where any of the said premises are, and take possession *152] of *the same, To have and to hold the said premises hereby granted, assigned, or otherwise assured or intended so to be unto the said James Berridge, William Haymen, and John Haymen Ivey, their executors, administrators, and assigns, Upon trust that the said trustees or trustee do and shall as soon as may be, and in such way or manner as to them or him may seem best, call in, collect, and receive the said estate, effects, and premises, and sell and convert into money all the saleable parts thereof, with power nevertheless for the said trustees or trustee in their or his discretion to postpone the sale of all or any part of the said estate, effects, and premises, and to *lease* such unsold portions, either from year to year, or for a term of years, for such rents as they or he may think fit, and with power for the said trustees or trustee to make any such sale

either by public auction or private contract, or partly in either mode, and subject to such conditions, upon such terms, and generally in such manner as he or they may think fit, and, as to any policies of insurance, either by way of surrender to the office or offices which may have granted the same or otherwise, *and to give credit for the whole or any part of the purchase-money, either with or without taking security for the same*: And it is hereby agreed that the said trustees or trustee shall stand possessed of the moneys to arise from such calling in, collection, receipt, leasing, and sale as aforesaid, after payment thereof of all costs and expenses of and incidental to such calling in, collection, receipt, leasing, and sale as aforesaid, Upon trust thereout in the first place to pay the costs of and incidental to the said meeting of creditors, and of and incidental to the preparation, execution, and registration of these presents, and procuring the signatures or assent of the said creditors thereto, and of and incidental to the carrying out the trusts and provisions of *these presents, including payment of any premium payable [*153 as hereinafter mentioned: And the said Stephen Jennings doth hereby appoint the said trustees or trustee to be true and lawful attorneys, &c.: Provided always, and it is hereby agreed and declared, that the said trustees or trustee *shall have full discretion from time to time to determine the amount of dividend which shall from time to time be declared and paid out of the moneys in hand to and among the said creditors in respect of their respective debts, and to pay such dividends at such place, and in such manner, as they or he shall think fit*: And it is hereby further agreed and declared that it shall be lawful for the said trustees or trustee to require any person or persons claiming to be a creditor or creditors of the said Stephen Jennings, notwithstanding that he or they may have executed these presents, and that the amount or alleged amount of his or their debt or debts may have been inserted in the schedule hereto, *to verify the nature and amount of such debt or claim, with full particulars showing the consideration thereof, by statutory declaration or other proof before the Court of Bankruptcy, or otherwise, as the said trustees or trustee may think fit*: And it is hereby further agreed, that it shall and may be lawful for the said trustees or trustee to give time for the payment of any debt or debts owing to the said Stephen Jennings, and to accept payment thereof by instalments, composition, or otherwise, and to abandon any debt or debts which they or he the said trustees or trustee shall consider bad, and also to make such arrangements as they or he may think expedient with any creditor or other person holding any portion of the estate and effects of the said Stephen Jennings by way of mortgage, pledge, or lien, in order to redeem or discharge such mortgage, pledge, or lien, or to release the equity of redemption thereof: And it *is hereby further agreed and declared that it shall be lawful [*154 for the said trustees or trustee to employ any persons or any person to assist them or him in winding up the affairs of the said Stephen Jennings, and the collection or realization of the estate and effects herein comprised, and to pay out of the said trust-estate to such person or persons such a fair remuneration for services rendered as the said trustees or trustee may think fit: Provided always, and it is hereby further agreed and declared that it shall be lawful for the

said trustees or trustee to call a meeting of the said creditors, by circular letter stating the time, place, and object of the meeting, and sent by post or otherwise to the last known place of abode or business in England of such creditors, or their agents, in time to give such creditors or agents seven clear days' notice of such meeting; and that all resolutions which shall be passed at such meeting with reference to the subject or subjects stated in the said circular letter by the majority in number representing three-fourths in value of the creditors present or represented at such meeting shall bind all the creditors to whom or to whose agents the said circular letter was sent, and also the said Stephen Jennings, his executors, administrators, and assigns: And it is hereby expressly agreed and declared that these presents shall not prejudice or affect the rights or remedies of any of the said creditors against any surety or sureties, or any person or persons other than the said Stephen Jennings, his heirs, executors, or administrators, nor shall these presents prejudice or affect any security which any of the said creditors may have or claim for his debt; but nevertheless, if such security shall be enforceable against the said Stephen Jennings, or his estate or effects, such creditor shall (unless he shall *155] give up or abandon such security) be entitled to *receive the dividends under these presents on so much only of his debt as may remain after such security shall have been realized or credit given for the full value thereof, such value to be agreed upon between the said trustees or trustee and such creditor, or, in case of disagreement, to be determined by the arbitration of two impartial valuers, one to be chosen by the said trustees or trustee, and the other by such creditor, or of an umpire to be chosen by such valuers before proceeding to business: [Provision for appointment of new trustees: trustees to be responsible for their own acts only, &c.] And this indenture lastly witnesseth, that, in pursuance of the said agreement in this behalf, and in consideration of the grant, conveyance, assignment, and transfer hereinbefore contained, the said creditors do hereby, for themselves respectively, and their respective heirs, executors, administrators, partners, partner, or successors, acquit, release, and for ever discharge the said Stephen Jennings, his heirs, executors, and administrators, estate and effects, of, from, and against all the debts, claims, and demands of them the said creditors respectively, and of and from all actions, suits, and other proceedings at law or in equity which the said creditors respectively, or their respective partners or partner, have at any time heretofore brought, instituted, or taken, or which they the said creditors respectively, or their respective heirs, executors or administrators, partners, partner, or successors, may or might (but for these presents) at any time hereafter bring, institute, or take against the said Stephen Jennings, his heirs, executors, or administrators, estate or effects, for or by reason or on account of such debts, claims, and demands, or any of them: Provided always and it is hereby expressly agreed and declared, that, in case the said bankruptcy shall not be duly annulled within one calendar month from the *156] *day of the date of these presents, then the release hereinbefore contained on the part of the said creditors, and every other clause, covenant, and provision herein contained, shall be absolutely void. In witness," &c. [Here followed a schedule containing

the names of several creditors and the amount of their respective debts.] Averment, that Stephen Jennings in the said deed mentioned is the defendant, and that the said J. Berridge in the said deed mentioned is the said J. Berridge in the said plea mentioned, and that the said W. Haymen in the said deed mentioned is the said W. Haymen in the said plea mentioned, and that the said J. H. Ivey in the said deed mentioned is the said J. H. Ivey in the said plea mentioned.

The defendant demurred to the replication, the ground of demurrer stated in the margin being "that the provisions contained in the deed set forth in the replication are not unreasonable, or such as to render it invalid." Joinder.

Macnamara, in support of the demurrer.(a)—The deed in question is a valid deed, and an answer to the action. The court will so construe it as to make it valid, rather than otherwise: per Bramwell, B., in *Strick v. De Mattos*, 3 Hurlst. & Colt. 22, 59. It is no objection to the deed that it gives to the trustees powers which could not be enforced in a court of equity. It will be presumed that they will do their duty; and, if they attempt to exceed it, they will be restrained; and any clause which is contrary to the *general scope and intention of the Bankruptcy Act would be rejected: per Lord [*157 Westbury, C., in *Ex parte Spyer*, *In re Josephs*, 32 Law J., Bankruptcy 62. [BYLES, J.—To which clause of the deed is that remark applicable?] To almost every one. *Hidson v. Barclay*, 3 Hurlst. & Colt. 9, in error 3 Hurlst. & Colt. 361, is an authority to show that there is nothing unreasonable in this deed. [WILLES, J.—The creditor can get nothing without acceding to this deed: if so, it is not a deed for the equal benefit of all the creditors.] The assignment to the trustees is in terms for the benefit of all the creditors. The first objection is to the leasing power; but, presuming that the trustees will act reasonably, what possible objection can there be to that? Then, as to the authority to sell upon credit,—by selling on credit in all probability a better price would be obtained; and, assuming that the trustees will act reasonably and discreetly, why should they not be intrusted with that power? Nor is there anything unreasonable in the provision that the trustees shall determine the amount of dividends and the time and mode of payment. Then, as to the proof of debts by statutory declaration,—it is but right and reasonable that the trustees should be satisfied of the existence of a debt before a creditor is admitted to share in the proceeds of the estate. Bramwell, B., in delivering the judgment of the Court of Exchequer in *Strick v. De Mattos*, 3 Hurlst. & Colt. 57, says: "Then, clause 13, as to proof of debts, was objected to, and it was said by virtue of its provisions a creditor might be required, though at a distance, or under other circumstances of difficulty or unreasonableness, to make written statements of debt and declarations under the statute. But the answer is, that this clause is not unreasonable because an attempt might be made to apply it unreasonably. We say an attempt, because it seems to us

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the deed set forth in the plea and in the second replication is an answer to this action:

"2. That the said deed is valid as a deed under the Bankruptcy Act, 1861, its provisions being reasonable and equal."

*158] it *would be a breach of duty in the inspectors to exact these statements and declarations in such cases as those put at the bar; and consequently that requisitions to that effect could not be enforced; as relating to an insolvency where there is a large number of creditors, if honestly applied, as we are to assume it will be, this clause is not unreasonable." The decisions of this court in *Leigh v. Pendlebury*, 15 C. B. N. S. 815 (E. C. L. R. vol. 109), and *Lyne v. Wyatt*, 18 C. B. N. S. 593 (E. C. L. R. vol. 114), proceeded on the ground that the debt was forfeited for non-compliance with the condition.

Pateson, contra, (a) referred to *Coles v. Turner*, 18 C. B. N. S. 736 (E. C. L. R. vol. 114), where it was held that a stipulation in a trust-deed for the benefit of creditors, under the 192d section of the Bankruptcy Act, 1861, declaring that "it shall be lawful for the trustees to require any person or persons claiming to be a creditor or creditors of the debtor (notwithstanding that he or they may have executed the deed, and that the amount or alleged amount of his or their debt or debts may have been inserted in the schedule thereto) to verify the nature and amount of such debt or claim, with full particulars showing the consideration, thereof by statutory declaration proved before the commissioners of bankruptcy, or otherwise, as the said trustee or *159] *trustees may think fit,"—is unreasonable, and renders the deed inoperative as against a non-assenting creditor.

ERLE, C. J.—We must abide by our judgment in *Coles v. Turner*. The plaintiffs are therefore entitled to judgment on this demurrer.

The rest of the court concurring,

Judgment for the plaintiffs.

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. The deed is not binding on non-assenting creditors:

"2. The deed contains unreasonable provisions, and therefore is not binding: the following provisions are unreasonable,—the power to lease,—the power to pay dividends at such place and in such manner as the trustees think fit,—the provision as to proving debts,—the provision that resolutions passed at certain meetings of creditors shall be binding,—and the provision as to valuing securities:

"3. The release in the deed is too extensive."

FRAYES and Another v. WORMS. June 8.

By a charter-party for a voyage from Cardiff to San Francisco with a cargo of coals, the owners engaged to deliver the same "on being paid freight at and after the rate of 4*l.* 10*s.* per ton of 20 cwt. *delivered*;" and the instrument contained the following stipulation,—*"The freight to be paid by good and approved bills on London at six months' date from date of sailing, less cost of insurance, to be effected by the charterer at ship's expense, or in cash, under discount equal thereto, at charterer's option; less, in either case, 800*l.*, which is to be paid on delivery of cargo, in cash, at the current rate of exchange."* The freight, to the extent of 4807*l.*, was paid in advance, and a general average loss was sustained on the voyage:—Held, that the owners were not liable to contribute to such general average in respect of the freight so advanced, but only in respect of the 800*l.* which was to be paid at the end of the voyage; but that the charterers, who had an insurable interest in that portion of the freight, were the parties to contribute.

THIS was an action brought by the plaintiffs against the defendant for money payable for certain general average alleged to have become payable in respect of goods on a voyage of a ship called the *Hibernia*,

and in respect of certain loss, damages, and expenses incurred by the plaintiffs in and about the preservation of the ship and cargo and the said goods from damage and loss, and for general average for and in respect of money paid by the defendant to the plaintiffs before completion of the voyage, by way of advance of freight, and for losses, damages, and expenses incurred by the plaintiffs in and about the preservation of ship and cargo and freight from damage and loss. There were also counts for money paid, and money found due on accounts stated.

*The defendant pleaded never indebted, payment, and the statute of limitations, and a special plea setting up the American judgment afterwards mentioned. The plaintiffs joined issue, and demurred to the last plea. [*160]

The amount claimed by the plaintiffs on the writ was 1007*l.* 13*s.* 11*d.*, with interest at 4 per cent. per annum from the 29th of June, 1854.

The following case was stated under a judge's order for the opinion of the court:—

1. On the 21st of April, 1853, Mr. Edward Oliver, the then owner of the ship *Hibernia*, through his agents, Messrs. Parry, Brown & Co effected the following charter of the said ship to the defendant:—

“Cardiff, 21st April, 1853.

“It is this day mutually agreed between H. H. Parry, Brown & Co., agents for owners of the good ship or vessel called the *Hibernia*, of the measurement of $8\frac{1}{2}$ tons or thereabouts, now at Liverpool, and H. Worms, of Cardiff, merchant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all possible despatch sail and proceed to Bute-Dock, Cardiff, or so near thereunto as she may safely get, and there load from the factors of the said affreighters a full and complete cargo of steam-coal; captain taking sufficient coal for ship's use independent of the cargo; same to be endorsed on the bills of lading. Cargo to be brought and taken from alongside at merchant's risk and expense, and not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture: and, being so loaded, shall therewith proceed to San Francisco, or any of the landing places within the waters of San Francisco or Sacramento within one day's sail of the former, or so near thereunto as she may safely get, and deliver the same on *being paid freight at and after the rate of 4*l.* 10*s.* British sterling per ton of 20 cwt. delivered. [*161]

Ship to be addressed to charterer's agent at port of discharge on usual terms for doing the ship's business. The act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage always excepted. *The freight to be paid by good and approved bills on London at six months' date from date of sailing, less cost of insurance to be effected by the charterer at ship's expense, or in cash, under discount, equal thereto, at charterer's option, less in either case 800*l.*, which is to be paid on delivery of cargo, in cash, at the current rate of exchange; and ten days on demurrage over and above the said laying days, at 10*l.* per day. Penalty for non-performance of this agreement, 5000*l.* The vessel to be loaded at the quickest turn obtainable,*

with Powell, Wayne, or Thomas and Joseph, and discharged at rate of not less than 20 tons per working day, on being ready to deliver."

2. The defendant under the said charter-party loaded the ship with a cargo of coals, consisting of 1246 tons: and the following bill of lading was duly signed for the same by the master of the said ship:—

"Shipped in good order and condition, for Mr. H. Worms, by Mr. J. R. Smith as agent, in and upon the good ship or vessel called the Hibernia, whereof John Cleverley is master for this present voyage, and now riding at Cardiff, and bound to San Francisco, California. Twelve hundred and forty-six tons of best hard picked large Merthyr steam-coal, being marked and numbered as per margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of San Francisco (all and every the dangers and accidents of the *162] seas and navigation of *whatever nature and kind excepted), unto Mr. H. Worms or order, on being paid freight for said coals as per charter-party, with primage and average accustomed. In witness, &c.

3. Agreeably to the terms of the said charter-party, the defendant, in payment of the freight payable under the said charter-party, less the sum of 800*l.* mentioned therein, payable on delivery of the cargo, gave two bills of exchange amounting together to the sum of 4518*l.* 6*s.*, being the balance of the freight less the insurance thereon, which amounted to the sum of 288*l.* 14*s.*; and thereupon the master endorsed on the said bill of lading the following receipt:—

"Received of Mr. H. Worms the sum of four thousand eight hundred and seven pounds sterling on account of the within freight, viz.

| | | | |
|-----------------------------------------------------------------------------|--------------|----------|----------|
| "By two bills on London each of 2259 <i>l.</i> 3 <i>s.</i> , together . . . | 4518 | 6 | 0 |
| "Insurance 5 per cent., on each 144 <i>l.</i> 7 <i>s.</i> , together . . . | 288 | 14 | 0 |
| | <u>£4807</u> | <u>0</u> | <u>0</u> |

"Said amount of 4807*l.* to be deducted from freight at San Francisco."

4. Both the said bills of exchange were paid at maturity.

5. On the 14th of July, 1853, the said Mr. Edward Oliver transferred the said ship and the benefit of the said charter to the plaintiff Valentine Frayes; and he on the 26th of October, 1853, transferred 8/64ths of the said ship to the plaintiff Williams.

6. The ship shortly after the shipment of her cargo sailed on the voyage mentioned in the said charter-party, and during such voyage sustained considerable damage, and was for the safety of the general *163] adventure compelled to and did put into Valparaiso, where *she arrived on the 7th of January, 1854, and remained until March, 1854.

7. Expenses were necessarily incurred at Valparaiso in the repair of the ship, the particulars of which appeared in the average statement mentioned in paragraph 13 of this case; and it is agreed between the parties that the portion put down to general average in such statement were general average charges.

8. The master of the said ship, not having funds at his command to defray the expenses, on the 10th of March, 1854, properly borrowed the requisite amount at Valparaiso, and duly executed a bottomry-

bond, whereby the ship "together with all her tackle, apparel, furniture, and appurtenances, the said cargo and freight," were hypothecated to secure the sum of 13,132 dollars 62 cents of lawful money of the United States.

9. After the completion of the repairs, the ship proceeded on her voyage to San Francisco, where she arrived in June, 1854, and duly delivered the cargo.

10. The plaintiffs, after hearing of the injury sustained by the *Hibernia*, transmitted to San Francisco the sum of 1000*l.* towards defraying the bottomry-bond executed at Valparaiso.

11. On the 16th of May, 1854, the plaintiffs entered into the following contract with one William James:—

"53, South John Street, Liverpool,
"16th May, 1854.

"Messrs. Valentine Frayes and Bethnel Williams sell and William James of Liverpool buys the ship *Hibernia*, now supposed to be on her passage from Valparaiso to San Francisco, on the following conditions, viz., that the ship is to be transferred to the purchaser at once by bill of sale; and, in case she is not sold at San Francisco, or no heavy expenses incurred there upon her previous to the arrival of the person *sent out by him, he is to take possession of her in the purchaser's name, and he W. James is to become the sole [*164 registered owner; but it is understood that one-eighth of the said ship is still to belong to the original owners, viz., say one-eighth of the net value of the ship and freight after she is discharged in Cadiz and all expenses upon her are paid, is to belong to them: but, in case the ship does not become the property of the said William James, any expense which he may be put to in sending a person out to San Francisco, interest of money, or otherwise, is to be refunded him by the present owners.

"In taking possession of the said ship, the 1000*l.* already remitted to San Francisco by the present owners, with any balance of freight which may be due there (supposed to be about 8000*l.*), is to become the purchaser's, and also any insurance which is now due or may hereafter become due either in this country or New York on said ship or freight, and all freight on the return voyage, subject to the above reservation, or any other thing connected with the said ship, is to become his also.

"And, on payment for the said ship, the purchaser is to discharge the bottomry-bond now upon her for 3700*l.*, say about three thousand seven hundred pounds, liabilities in Cardiff, to Messieurs Parry, Brown & Co., Batchelor, Brothers, and the bank there, together about 1500*l.*, all wages and expenses on the voyage, and 500*l.* to the present owners, by his acceptance at six months from receiving advices of the said ship having left the port of San Francisco; and all right in the existing charter is transferred with the said ship also.

"VALENTINE FRAYES.

"BETHNEL WILLIAMS.

"W. JAMES.

"Mem. Everything paid to be debited to the ship, *and every- [*165 thing received to be credited her (with interest for and against), and $\frac{1}{8}$ of the balance to belong to the original owners, the other $\frac{7}{8}$ to

me, but nothing except what is named now. I to be liable for and only what wages may be due to the crew on the termination of the voyage."

And the said ship was on the said 16th of May, 1854, transferred to the said Mr. James by bill of sale.

12. Disputes subsequently arose with reference to the said contract between the plaintiffs and the said William James, which gave rise to proceedings at law and in equity; and, on the 2d of August, 1855, the following agreement was entered into by the plaintiffs and the said William James:—

"An agreement made this 2d of August, 1855, between Bethnel Williams, of Aberdare, in the county of Glamorgan, merchant, and Valentine Frayes, of Cardiff, in the same county, broker, of the one part, and William James, of Liverpool, merchant, of the other part: Whereas, certain differences have arisen between the parties hereto as to the performance of an agreement between them, dated the 16th of May, 1854, and proceedings at law and in equity are now pending between them in reference thereto, and they have this day agreed upon certain terms hereinafter set forth, whereby all proceedings are to be stayed, and all questions whatever under the said agreement and otherwise between the parties settled: Now, the said Bethnel Williams and Valentine Frayes on the one part, and the said William James on the other part, agree with each other, as follows:—

"1. That all proceedings at law and in equity between them be stayed:

"2. That each side pays his own costs of such proceedings:

*166] "3. That the said Bethnel Williams and Valentine Frayes discharge the said William James from any claim in respect to the one-eighth of the ship *Hibernia*, say the one-eighth of the net value of the said ship and freight reserved to them by the said agreement; and that the said William James is to be sole and absolute owner of the said vessel:

"4. The said Bethnel Williams and Valentine Frayes release the said William James from the liability to pay them or give them a bill of exchange for 500*l.* as mentioned in the aforesaid agreement:

"5. That the said William James has this day given to the said Bethnel Williams and Valentine Frayes a bill of exchange at six months' date for 750*l.* as the remaining full consideration under the aforesaid and this present agreement:

"6. That the said William James hereby releases the said Valentine Frayes from all claims under certain bills of exchange, making together 6000*l.*

"BETHNEL WILLIAMS.

"VALENTINE FRAYES.

"W. JAMES."

13. After the ship's arrival at San Francisco, an average statement was duly made out in accordance with the law: but this statement is not to preclude either party from raising the question who is to contribute in respect of freight. A copy of the said average statement accompanied and was to be deemed to form part of this special case.

14. In the month of July, 1854, Mr. James paid the amount of the said bottomry-bond given at Valparaiso: and this action is brought by and prosecuted for the benefit of the said Mr. James.

15. The defendant, by himself or his agents, duly paid the 800*l.*, the balance of the freight, and also the sum of \$912 charged on the cargo in the said average statement.

*16. The said Mr. James took proceedings in the district court of the United States for the northern district of California. [*167 A copy of the proceedings in that court, and of the judgment pronounced therein, accompanied and was to be deemed to form part of this special case.

17. The money directed by such judgment to be paid was forthwith paid.

18. The defendant, on the 21st and 25th of July, 1853, effected two policies of insurance in France for 130,000 francs on advances made on freight of the cargo by the said ship for the said voyage from Cardiff to San Francisco, with faculty to call at any or all ports in the Southern seas. The policy was stated to provide for reimbursement of the advances in all cases of fortune of the seas which might have for consequence the deprivation of the said advances from the person assured. Copies of the original policies accompanied and were to form part of the case. The above were the only policies effected in respect of the advances.

19. The pleadings accompanied and were to be deemed to form part of this special case.

20. The demurrer to the fourth plea was argued on the 26th of April, 1861, when the court held the fourth plea bad, and the second count of the declaration good. The judgment of the court will be found reported in the 10 C. B. N. S. 149 (E. C. L. R. vol. 100).

21. The court was to have power to draw any inferences of fact from the facts hereinbefore stated which a jury might draw.

The question for the opinion of the court was,—Whether the plaintiffs were entitled to recover all or any part of the money claimed by them.

If the court should be of opinion in the affirmative, then judgment was to be entered for the plaintiffs as *the court might direct, [*168 for such sum as the court might think fit, together with costs of suit. But, if the court should be of opinion in the negative, then judgment of *nolle prosequi* was to be entered for the defendant, with costs of defence.

Sir G. Honyman (with whom was *M'Leod*), for the plaintiffs.(a)—This is a claim by the shipowners against the charterer and shipper of the cargo: and the question is whether freight advanced, never to be returned, is to contribute to general average. As to the 800*l.* freight

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"That the plaintiffs are entitled to recover the general average in question, for the following reasons,—

"1. That it appears by the average-statement referred to in the 13th paragraph of the case, that the average-stater apportioned the general average among the ship, cargo, and freight, and that the contributable amount of the latter item was put at 5607*l.*, being the aggregate amount of the 4807*l.*, paid by the defendant after the sailing of the ship as mentioned in paragraph 3, and of the 800*l.*, payable at the port of discharge:

"2. That the plaintiffs are liable for general average in respect of the 800*l.* payable at San Francisco, that amount being at their risk; and the defendant is liable for general average in respect of the 4807*l.* paid as already mentioned, that amount being at his risk:

"3. That the plaintiffs are consequently entitled to recover a sum bearing the same proportion to the gross amount apportioned to freight as 4807*l.* bears to 5607*l.*."

to be paid on arrival out and delivery of the cargo, of course the owners must contribute; but not, it is submitted, in respect of the 4807*l.* paid in advance. The plaintiffs by the charter-party provided the charterer with the means of covering himself against risk. If he has omitted to do so, that does not entitle him to throw the loss on *169] the plaintiffs. On the *part of the defendant it will probably be contended, either that the 4807*l.* was paid under such circumstances as would make it recoverable back if the voyage were not completed, or that no general average was payable. The charterer was to insure the freight so advanced. How could he have any insurable interest therein unless it was a payment out and out? The bills were given for the amount, less the cost of insurance. If the ship had gone to the bottom, the charterer never could have reclaimed the money. That is the true test. Then it will be said, that, assuming this to have been money paid, lost or not lost, the defendant is not liable to contribute to general average. The principle of general average is thus stated in 2 Arnould on Insurance, § 343 (2d edit. p. 937),—"The leading principle of general average contribution, to whatever kind of loss it may be applied, is this, *that all the parties interested in the adventure for the benefit of which the loss was incurred, should be sufferers by the loss in exact proportion to the extent of their respective interests, but no farther*; and this object can only be obtained when the party whose property has been sacrificed, whose money has been disbursed, or whose credit has been pledged for the general benefit, is placed, by the result of the adjustment, exactly in the same position he would have stood in had the sacrifice been made, the expense incurred, or the credit pledged, not by himself, but by some other of his co-adventurers." Apply that here: the plaintiffs have received 4807*l.*: if the ship had gone to the bottom, they could not have been called upon to refund the money: quoad that sum, therefore, they derive no benefit from the ship's arrival. Whereas, the charterer, if the ship had gone down, would have lost his goods, and also the money he had paid for freight in advance. The shipowners, *170] *therefore, are the persons to contribute to general average in respect of the 800*l.* freight unpaid, and the charterer in respect of the 4807*l.*, as the value of the use of the vessel preserved to him by the sacrifice. The plaintiffs, who have raised the money on bottomry and paid the whole amount, are consequently entitled to call on the defendant for contribution. It appears on the case that policies have been effected. The defendant, therefore, will get the money from the underwriters; or, if he fails, it will be through his own fault. In Stevens & Benecke on Average, Boston edit. 215, it is said: "As in the value of the ship, so also in the value of the freight to be brought into contribution, the foreign authorities are not agreed. Some direct that only half the freight shall contribute; (a) others, the whole, after deducting the wages: one,—the Ordinance of Florence,—states one-third; and according to others, it is optional with the proprietors of the cargo, or with the owner of the ship, whether the full value of the ship or of the freight shall contribute. When the average is adjusted after the ship's arrival, and the freight is payable at the port of discharge, there can be no doubt that it should make part of the

(a) The Ordinances of France, Amsterdam, and Lisbon.

contributory interest; nor is there any when the average is settled at the loading port, if the freight, or whatever name it may be called by, be paid in advance; for, it then, being a charge on the invoice, becomes part of the value of the cargo: but, when the payment of the freight depends on the contingency of arrival,—the ship being a general one, *not chartered* for the voyage,—it is thought by some that the ship and cargo should alone contribute, provisionally, they being the only real property at stake; for, in case of the ship being lost on the voyage, she would have earned no freight.” Notwithstanding Mr. Phillips’s remarks on *the obscurity of some portions of this [*171 passage, it is sufficiently obvious that it is those only who are interested in the ship’s arrival who are to contribute to general average. In the present case, the average stater has adopted the rule laid down in the Ordinance of France. It is therefore submitted that the amount of average here is to be apportioned between the shipowners and the charterer in respect of their several insurable interests. The plaintiffs are entitled to recover the money expended by them for the general benefit of the adventure: Arnould, §§ 344, 399. Their right of reimbursement does not depend on the law of San Francisco: it arises the moment the expenditure is made.

Mellish, Q. C. (with whom was *Milward*), for the defendant.(a)—The first question is, who is to contribute to the general average. By the express terms of the charter-party, freight is payable only on coals *delivered*. How is that to be reconciled with the subsequent part of the instrument,—“*The freight* to be paid by good and approved bills on London at six months’ date from date of sailing, less costs of insurance, to be effected by the charterer at ship’s expense, or in cash, under discount equal thereto, at charterer’s option; less, in either case, 800*l.*, which is to be paid on *delivery of cargo, in cash, [*172 at current rate of exchange?” Taking the whole together, if no coals were delivered at San Francisco, no freight was payable at all: it was in terms payable only on the coals *delivered*. The money, therefore, was paid without consideration. “Freight,” in its strict legal sense, means a compensation for the carriage of goods. [BYLES, J.—Does that definition apply to freight which has actually been paid?] The instrument must be so read as if possible to give effect to the whole of it. [BYLES, J.—Taking the whole charter-party together, is it not plain that the 4807*l.* is a sum to which the word “delivered” does not apply? WILLES, J.—I have always understood, that, where the charterer is to insure the advance, the shipowner is not to return the money if the ship is lost. In *Hicks v. Shield*, 7 Ellis & B. 633 (E. C. L. R. vol. 90), by charter-party between the defendants, owners of a ship, and the plaintiff, it was agreed that the ship should proceed from London to Bassein, and there load a cargo from the plaintiff’s factors, and therewith proceed to London, and deliver the

(a) The points marked for argument on the part of the defendant were as follows:—

“1. That the defendant has paid all that could be payable for average on the goods, and is in no sense liable for any average in regard to freight, which in fact falls on the shipowner, and not on the charterer:

“2. That there is no agreement, either express or implied, to contribute general average for money paid by the defendant to the plaintiffs by way of advance of freight:

“3. That, assuming the defendant might be liable to some one for something, yet the present plaintiffs are not the proper persons to sue.”

same, on being paid freight at a specified rate: "cash for ship's disbursements to be advanced to the extent of 300*l.*, free of interest, but subject to insurance;" "the freight to be paid on unloading and right delivery of the cargo, as follows, say, in cash, less two months' interest at 5 per cent.;" and, if required, 300*l.* more to be paid in cash on arrival, less two months' interest." 300*l.* was advanced by the plaintiff's agents at Bassein for ship's disbursements. Neither plaintiff nor defendants insured in respect of this 300*l.* The ship left Bassein with a cargo for London, but was lost before reaching London. The plaintiff claimed the payment of the 300*l.* as a loan made to the defendants: the defendants tendered the amount at which the 300*l.* might have
 *173] been insured, but refused to pay more. It was held that the plaintiff's claim could not be supported, as it appeared from the charter-party that the advance was not a loan, but was an *advance on freight*. Lord Campbell said: "A sum of 300*l.* is to be advanced, subject to certain deductions, one of which is for insurance. If it is to be insured, it must be for freight in advance; for, a mere loan could not be insured: and, if it is not a mere loan, but advance of freight, the plaintiff cannot recover it back." Assuming the court to be against the defendant on the first point, the next question is, whether the shipowners can recover the general-average from the charterer. In Phillips on Insurance, § 1404, the learned author, dealing with the question whether, in an adjustment at the port of departure, freight advanced is to be included in the contributory value of the goods, says,—“Mr. Benecke (London ed. 1824, p. 314; Benecke & Stevens by Phil. 257) says, that, where a general average is adjusted on the value at the port of departure, freight advanced by the shipper is included in the value of the goods on which he contributes. But such a rule must be confined at least to the case of an advance of freight not to be recovered back in any event: but it is questionable whether it will apply in such case, since such advance has been held not to constitute a part of the amount of insurable interest in the adjustment of a total loss: *Winter v. Haldimand*, 2 B. & Ad. 649 (E. C. L. R. vol. 22). The case is one of an absolute purchase of a part of the freight; and the purchaser, namely, the shipper, is to that extent put into the place of the shipowner in a manner not unlike that in which the charterer of the whole ship may be substituted for the shipowner in respect of the whole freight. The question then arises, whether the shipper ought to contribute to general average on this proportion of the freight, where the freight is liable to contribute
 *174] to general average, just as the charterer of the whole ship may stand in the place of the shipowner as to the contributions on this interest. Why ought the shipper who has advanced his freight unconditionally to contribute more than he would otherwise be assessed on the same goods? Certainly not because the goods are of any greater value; but, if for any reason, because the freight of his goods is at his risk, as well as the goods themselves. It is then in his character of owner of the freight to this extent that he ought to make an additional contribution, if indeed he ought to make any such additional contribution at all. But an objection to this mode of adjustment is, that freight is not usually advanced upon the understanding that the shipper thereby takes any additional responsibility

in respect to contributions in general average. If, then, no part of the contribution can in such case be assessed upon the party advancing freight, without giving an effect to such advance different from what was intended by the parties, in the ordinary circumstances and understanding in case of such an advance, it suggests what seems to be the safest and most just and practicable rule in such case, namely, that *the contribution should not be affected in the least by any particular unusual stipulations as to the time of payment of freight*, but should be made precisely as if the goods had been shipped on the usual bill of lading, stipulating to pay the freight on delivery of the goods, estimating the freight on each passage distinctly, whether the parties agree for freight on the termination of successive passages, or partly in advance, or however otherwise they may agree. This rule would operate more equally in a great majority of cases, and save third parties from being affected by unusual stipulations of which they could not be apprised." [BYLES, J.—Suppose the charterer puts up the ship as a general ship?] In that case, the *increased freight which the charterer received [*175 would contribute to general average. [WILLES, J.—And the shipowner in respect of the chartered freight?] Yes. In Arnould, Vol. 2, § 352, it is said: "When the shipper pays freight in *advance* at the outset of the voyage, a question has been raised whether the freight so paid is to be added to the contributory value of the goods. Mr. Benecke thinks it is, because the loss of such freight to the shipper was saved by the sacrifice: Pr. of Indem. 314. Mr. Phillips is of a contrary opinion (3d edit. Vol. 2, pp. 157, 158): and it appears to me, for the reasons he gives, that, on principle, such addition ought not to be made, but that the shipper who thus pays in advance should be regarded as the purchaser of the freight, and not be exposed on account of it to any claim for contribution." The freight is not at risk. To be contributory at all, it must be pending at the time. "The proper place," says Mr. Arnould, § 350, "for the adjustment of general average, is, the ship's port of destination or discharge; when this happens to be a foreign port, the general average loss is adjusted there according to the law and usage of the country to which such foreign port belongs." At San Francisco, they would probably rely on Phillips.

Sir G. Honynman was not called upon to reply.

ERLE, C. J.—The general principle of contribution to general average has not been disputed. All who are interested must contribute to the expenses incurred for the joint benefit of ship and cargo. The owners of the ship, the freight, and the cargo are liable to contribute, each to the extent of what he has at stake. Here, the claim is in respect of 4807*l.* advanced freight on a charter-party, which was not to be returned: that sum, therefore, was no longer at risk. *The charterer under such circumstances has an interest in [*176 the ship and in the value of the goods increased by the amount of the freight advanced. The general rule seems to me to be, that the charterer is liable to contribution for general average in respect of advances on freight. I therefore think the plaintiffs are entitled to judgment.

WILLES, J.—I am of the same opinion. As to the question whether the money advanced on account of freight was to be returned in the event of the goods not reaching their destination, that seems to me to

be concluded by the terms of the charter-party. The charterer was to insure the advance. It was therefore at his risk: and he must proceed against his underwriters. As to the second question, which is whether a person who has advanced money on account of freight, and has shipped his goods on the voyage, is liable to contribute to general average, I apprehend that must be answered in the affirmative. This is not a question between underwriters on cargo and underwriters on freight. If it were, it might be necessary to go into the question whether the interest of the defendant was an interest in cargo or an interest in freight. He is interested in the cargo, and he has purchased the right to have it carried to its destination. Without regard to the liability of the underwriter, it is laid down that the sacrifice made for the benefit of all is to be contributed to by the persons interested in the ship, in the freight, and in the cargo. Here, the charterer is interested in the safe carriage of the cargo. He is interested in the same way as a shipowner who has partly filled up the ship with his own goods is interested. That might be insured in the name of freight, and would have to contribute to general average. The case seems to me a very clear one.

*177] *BYLES, J.—I am of the same opinion. The charterer is in reality the purchaser of a portion of the freight, and is liable to the loss of that freight by the loss of the ship. He therefore was the person liable to contribute to general average in respect of the 4807*l*. paid in advance. In substance, his goods are augmented in value by the prepayment he has made. It is not necessary, however, to put the case on that ground. Justice is plainly on the side of the plaintiffs.

MONTAGUE SMITH, J.—I am of the same opinion. Upon the fair construction of this charter-party, I think the 4807*l*. advanced on account of freight could in no event be recoverable back. The charterer had an interest in the cargo, plus the freight advanced, and consequently was liable to contribute to that amount to general average.

Judgment for the plaintiffs.

THE HIGHWAY BOARD OF WREXHAM, Appellants; JAMES HARDCASTLE, Respondent. *May 30.*

A.'s year of office as surveyor of highways in the township of D. expired on the 25th of March, 1863, when B. was appointed his successor, pursuant to the 5 & 6 W. 4, c. 50, and at the next special sessions (on the 1st of April) A. verified and passed his accounts, which showed a balance of 24*l*. 6*s*. 5*d*. in his hands due to the township. At this time there were debts owing by A. as such surveyor. On the 10th of April, a highway board was formed (under the 25 & 26 Vict. c. 61) for a district which included the township of D.; and on the 4th of May the board appointed a district-surveyor. B. never acted as surveyor at all:—

Held,—upon the construction of the 5 & 6 W. 4, c. 50, ss. 42, 43, and 25 & 26 Vict. c. 61, ss. 11, 43,—that A. was an “outgoing-surveyor,” and as such liable to account to the board; but that he was entitled to the same allowances for disbursements, &c., from the board as he would have been entitled to if he had paid over the balance to his immediate successor in office, B.

THE following case was stated, pursuant to the 20 & 21 Vict. c. 43, for the opinion of this court:—

*178] At a special sessions for the highways, holden at *Ruabon, in and for the division of Ruabon, in the county of Denbigh,

on the 4th of November last, before two of Her Majesty's justices of the peace in and for the said county, a complaint dated the 6th of October, 1864, and preferred by the highway board of the Wrexham district, hereinafter called "the appellants," against James Hardcastle, Esq., hereinafter called "the respondent,"—"For that he the said James Hardcastle, having been an outgoing surveyor of the highways for the township of Dynbrynle-issa, in the said county, now included within the Wrexham highway district, and as such outgoing surveyor being liable and bound to account to the said board for all the moneys in his hands by virtue of his office, and to pay over all surplus moneys or balances to the treasurer of the said board, had neglected to render such accounts, and to pay over to the treasurer of the said board the balance remaining in his hands as such surveyor," was heard and determined by them, the said parties being then present; and upon such hearing the justices dismissed the complaint without costs.

The appellants demanding a case, the justices stated the facts and their decision, as follows:—

On the hearing of the aforesaid complaint, it was proved, that, during the year ending on the 25th of March, 1863, Mr. Hardcastle, the respondent, was surveyor of highways for the township of Dynbrynle-issa, in this division, and in that capacity collected highway-rate and repaired roads; that, on the 25th of March, 1863, Mr. Joseph Jones was duly appointed surveyor of the highways for the said township, and succeeded the respondent in office as such surveyor, pursuant to the Highway Act, 5 & 6 W. 4, c. 50; and that, at the next succeeding special sessions (held on the 1st of April, 1863), the respondent duly verified *and passed his accounts before the justices, [*179 showing a balance of 24*l.* 6*s.* 5*d.* in his hands due to the township: and it was also proved that there were debts owing by Mr. Hardcastle as such surveyor, and some arrears uncollected of the highway-rate made during his year of office. It was also proved that the working-tools used by the roadmen of the said township were left upon Jones's premises soon after the vestry: but the exact date when they were so left was not shown. It was also admitted, that, upon the 10th of April, 1863, the highway board for the Wrexham district (which includes the township of Dynbrynle-issa) was duly formed, and held their first meeting under the provisions of the Highways Management Act, 25 & 26 Vict. c. 61; and that a clerk was then duly appointed; and that, upon the 4th of May, 1863, a district-surveyor was appointed by the said board. It was likewise proved that Jones never performed any act of surveyor, either in the repairs of the roads, collecting rate, or otherwise, for the township; that he never received the books nor balance from the respondent as his predecessor in office; that he delivered up the working-tools belonging to the office, which had been left on his premises, to the district-surveyor for the highway board; and that the respondent objected to pay over the balance of 24*l.* 6*s.* 5*d.* to the highway board, without having deductions allowed therefrom for payments which he claimed to have made on account of the township after his year of office had expired, but which claim the board would not recognise.

Upon these facts, it was contended by the respondent that he was not liable to this proceeding on the part of the highway board, as

LONGMORE v. THE GREAT WESTERN RAILWAY COMPANY. May 81.

A railway company, for the more convenient access for passengers between the two platforms of a station, erected across the line a wooden bridge, which the jury found to be dangerous:—Held, that the company were liable for the death of a passenger through the faulty construction of this bridge, although there was a safer one about one hundred yards further round, which the deceased might have used.

THIS was an action brought by the plaintiff, as administratrix of her deceased husband, against the Great Western Railway Company, to recover compensation for his loss, which was alleged to have occurred through the improper construction of a bridge belonging to the defendants.

The cause was tried before Keating, J., at the last Spring Assizes at Stafford. The facts proved were as follows:—The deceased, who was about sixty years of age, whilst on his way to the booking-office at a small station on the defendants' railway between Birmingham *184] and Wolverhampton, in crossing a wooden bridge *erected by the company for the convenience of passengers wishing to go from one side to the other, fell through what was described in the declaration as a "dangerous aperture," on to the platform below, and was killed. At the place through which the deceased fell, there was a descent of eight or ten steps, between which and the hand-rail at the side was an opening of seven feet three inches by four feet two inches, without any protection. Two witnesses called on the part of the plaintiff stated that in their opinion the bridge was extremely dangerous.

For the defendants, it was proved that the bridge in question had been erected about ten years; that it was a clear moonlight night when the accident happened; that the steps were in perfect repair; and that, though many thousand persons had passed over the bridge (and the deceased himself many times), no casualty had ever before happened there. It was also proved that there was another bridge over which the deceased might have gone if so minded, but which was about one hundred yards further round. And it was submitted that there was no evidence to go to the jury of negligence on the part of the company; that the company were not bound to provide a bridge more than ordinarily safe; and that, if the public chose to avail themselves of the shorter cut, they must take the bridge as they found it.

The learned judge left it to the jury to say whether or not the company had been guilty of negligence in providing a bridge for the use of the public that was not reasonably safe.

The jury returned a verdict for the plaintiff, damages 500*l*.

Cooke, Q. C., pursuant to leave reserved to him, in Easter Term *185] last obtained a rule nisi to enter a *nonsuit, on the ground that there was no evidence of negligence to go to the jury; or for a new trial, on the ground that the learned judge ought to have directed the jury that the defendants were not liable, there being another bridge crossing the railway, and that the deceased used the wooden bridge at his own risk. He referred to *Bolch v. Smith*, 7 Hurlst. & N. 736.

Huddleston, Q. C., and *Macnamara*, now showed cause.—There was abundant evidence of negligence to go to the jury, and (if it were necessary so to contend) to warrant the verdict. The deceased was going to the booking-office by a mode of access provided for the public by the defendants. It was their duty to see that it was safe. Two witnesses proved that it was dangerous: and the result justified their opinion. [WILLES, J.—The Privy Council in one case held that the occurrence of an accident was *prima facie* evidence of negligence: (a) but that is inconsistent with some other authorities.] There was no pretence for saying that the deceased by his own carelessness contributed to the accident: nor did the fact of there being another and a safer bridge a hundred yards off absolve the company from the duty of making the bridge in question safe. It may be, that, if a way be dedicated to the public with a dangerous structure on it, the public must take it with the danger. (b) But, if a railway company for their own convenience choose to construct a bridge to connect the two platforms of a station, and invite the public to use it, they are responsible if it turns out to be unsafe. It is to be remembered that this bridge is to be used, not by the active and robust only, but also by children and by the old and infirm. In the case referred to at the trial [*186 (*Bolch v. Smith*), there was no duty.

Cooke, Q. C., and *H. James*, in support of the rule.—To render the company liable, there must be some evidence of negligence on the part of their servants, some failure to perform a legal duty. They are not responsible for an extraordinary and unforeseen accident at a spot which has been safely traversed for years by thousands. If the company ought to have known that the want of an additional rail made this bridge peculiarly dangerous, so ought the deceased, who was proved to have passed over it many times. The case is in this respect very like that of *Toomey v. The London, Brighton, and South Coast Railway Company*, 3 C. B. N. S. 146 (E. C. L. R. vol. 91). On the platform of a railway station there were two doors in close proximity to each other, the one, for necessary purposes, had painted over it the words "For gentlemen," the other had over it the words "Lamp room." The plaintiff, having occasion to go to the urinal, inquired of a stranger where he should find it, and, having received a direction, by mistake opened the door of the "lamp room," and fell down some steps, and was injured. In an action against the railway company, it was held, that, in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting the plaintiff, on the ground that there was *no evidence* of negligence on the part of the company. In using a way like this, some caution is necessary on the part of the public. In *Bolch v. Smith*, 7 Hurlst. & N. 736, the workmen in a government dock-yard were permitted to use certain water-closets erected for their accommodation, and for that purpose to use certain paths across the dock-yard. The defendant, a government contractor, was permitted to erect in the dock-yard certain machinery for the purpose of his work. He [*187 erected across a path which led to one of the water-closets a

(a) *The Great Western Railway Company of Canada v. Braid, and The Same v. Fawcett*, 1 Moore's P. C. N. S. 101.

(b) See *Robbins v. Jones*, 15 C. B. N. S. 231 (E. C. L. R. vol. 109).

revolving-shaft, partly covered with planks. The plaintiff, a workman in the dock-yard, having gone along this path to the water-closet, on his return stumbled, and, on putting out his hand to save himself, his arm was caught by the shaft, and lacerated. There was another path along which he might have gone, but the one he used was the more convenient. It was held that the defendant was not liable for the injury, since he was under no obligation to fence the shaft, and the defect in the fencing was apparent. In *Cornman v. The Eastern Counties Railway Company*, 4 Hurlst. & N. 781, the defendants, a railway company, had on their platform, standing against a pillar which passengers passed in going to and coming from the trains, a portable weighing machine, which was used for weighing passengers' luggage, and the foot of which projected about six inches above the level of the platform. It was unfenced, and had stood in the same position, without any accident having occurred to persons passing it, for about five years. The plaintiff, being at the station on Christmas Day inquiring for a parcel, was driven by the crowd against the machine, caught his foot in it, and fell over it. It was held that there was no evidence of negligence on the part of the company to go to the jury, the machine being in a situation in which it might have been seen, and the accident not being shown to be one which could have been reasonably anticipated. Bramwell, B., in delivering judgment, says: "In such a case, it is always a question whether the mischief could have been reasonably foreseen. *Nothing is so easy as to be wise after the event.* But here no witness stated that he would have known that the position of the weighing-machine was likely to cause danger. I *188] adopt the rule stated by *Williams, J., in *Toomey v. The Brighton Railway Company*,—"It is not enough to say that there was *some* evidence. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury: there must be evidence on which they might reasonably and properly conclude that there was negligence." Here, the evidence was that the company might reasonably have anticipated that no mischief could occur, since no mischief had resulted from keeping the machine in the position in which it stood for so long a period." Here, the bridge had been erected ten years, and no accident had happened there. In *Marfell v. The South Wales Railway Company*, 8 C. B. N. S. 525, 534 (E. C. L. R. vol. 98), Erle, C. J., says: "The undefined latitude of meaning in which the word 'negligence' has been used, appears to me to have introduced the evil of uncertain law to a pernicious extent; and I think it essential to ascertain that there was a legal duty, and a breach thereof, before a party is made liable by reason of negligence." The evidence here showed that the accident was one of an extraordinary and unforeseen nature.

ERLE, C. J.—I think this rule should be discharged. The question seems to me to have been one peculiarly for the jury, viz. whether the defendants exercised reasonable care and skill in the construction of this bridge which passengers going by their railway were invited to use. The evidence given on the part of the plaintiff, was, that it was not constructed with reasonable skill: and I think the judge clearly would not have been justified in taking upon himself as a matter of

law to determine as to the propriety of its construction, and withdraw that question from the jury. There being, then, evidence for the jury, and it being *within their province to decide upon it, and they having done so, and having also found that the deceased himself did nothing to contribute to the accident, I think we ought not to disturb their verdict. [*189]

WILLES, J.—I am of the same opinion.

BYLES, J.—I also am of opinion that this rule should be discharged. I was struck at first by the observation of Mr. James: but the fact is, that the defect itself, as we now see, is not obvious to any one who looks at the bridge: and, further than that, the danger from the defect, even if the defect *were* obvious, would not be apparent: and, that being so, and the bridge being a nearer mode of access to the railway from the house from which the deceased came, he was invited by the company to pass over the bridge, which had a defect in it which was not obvious, and the danger from which was not apparent. In addition to that, it is to be recollected that the jury have negatived all carelessness on the part of the deceased. The simple question is, was this an improper structure. The plaintiff's witnesses stated that it was: and they stood uncontradicted, and their judgment is sustained by the event. It was purely a question for the jury.

KEATING, J.—I am of the same opinion. No doubt, the jury might, if so minded, have found that there was no negligence on the part of the company. And it certainly seemed to me that there was a very strong case for the company. If I had been upon the jury, I do not say that I should have found the same way, though I do not at all mean to *intimate an opinion that they should not have found as they did. [*190]

Rule discharged.(a)

(a) See *Nicholson v. The Lancashire and Yorkshire Railway Company*, 3 Hurlst. & Colt. 534. There, the plaintiff, a passenger by the defendant's railway, was set down at Thornhill Lees after dark on the side of the line opposite to the station and place of egress. The train was detained more than ten minutes at Thornhill Lees, and from its length blocked up the ordinary crossing to the station, which is on the level. The ticket-collector stood near the crossing with a light, telling the passengers, as they delivered their tickets, to "pass on." The plaintiff passed down the train to cross behind it, and from the want of light stumbled over some hampers put out of the train, and was injured. The practice of passengers had been to cross behind the train, when long, without interference from the railway company. It was held that these facts disclosed evidence for the jury of negligence on the part of the company.

MURCHIE v. BLACK. June 3.

A. was possessed of a piece of land which was laid out for building and offered for sale in lots, subject to certain conditions, one of which was as follows:—"The purchaser will be required to covenant to build according to the elevation of lot 2, or such other elevation as the vendor shall approve." By another condition it was provided that the walls between the several lots when built should be deemed party-walls, and that, if erected by the purchaser of any one of such lots, the owner of the adjoining lot should be bound to pay him one-half the cost if he should make use of the same.

On the 12th of May, 1863, the defendant became the purchaser of lot 6, and on the 26th the plaintiff became the purchaser of lot 7, both purchases being declared to be "subject to the above conditions."

When the plaintiff took possession of lot 7, there was on it an ancient wall 15 feet high adjoining lot 6; and the plaintiff raised this wall to the height of 24 feet.

The defendant afterwards took possession of lot 6, and proceeded to excavate the land for the

purpose of erecting thereon a building in accordance with his agreement. This was done in a proper manner, and so as not to have affected the ancient wall on lot 7 if it had remained in its original state; but the withdrawal of so much of the lateral support of lot 7 rendered the soil insufficient to sustain the additional weight which the plaintiff had placed thereon, and the building in consequence fell:—

Held, that the defendant was not liable; he having done no more than he was required (or licensed) by his agreement with A. to do.

THIS was an action to recover compensation for damages alleged to have been sustained by the plaintiff by reason of the defendant's *191] having caused the plaintiff's *house to fall down. The cause came on to be tried before Shee, J., at the Carlisle Spring Assizes, 1864, when a verdict was found for the plaintiff, by consent, subject to terms embodied in an order of Nisi Prius thereupon made, for the money claimed in the declaration, and subject to the following case:—

1. On the 10th of February, 1862, Francis Graham was seised in fee-simple in possession, by virtue of a purchase and conveyance from one Edwin Hough, of certain lands and premises situate on the south side of Devonshire Street, in the city of Carlisle. They consist of the pieces of land described on a plan annexed to the case as lots 6, 7, 8, 9, 10, and 11.

2. On the 10th of February, 1862, the said Francis Graham conveyed the said lands to Edwin Hough by way of mortgage in fee, to secure the repayment of 2000*l.* advanced by the said Edwin Hough to the said Francis Graham. Before Francis Graham's said purchase, the lands so purchased by him had, with other pieces of land also situate on the south side of the said street, and which are described in the said plan as lots 1, 2, 3, 4, and 5, been laid out by Mr. Hough in lots as shown in the said plan, for building purposes. Of the lands so laid out, lots 1, 2, 3, 4, and 5, had before Francis Graham's said purchase been sold by Mr. Hough, who at the time of such sale was seised thereof in fee-simple in possession. Lots 2, 3, and 4, and part of lot 5, had been built upon before the 27th of March, 1863.

3. After the said purchase by the said Francis Graham, and before the 27th of March, 1863, Francis Graham had sold lots 9 and 11; and the same had been conveyed to the purchaser thereof.

4. On March 27th, 1863, the lands described on the plan as lots 6, 7, 8, and 10, were put up for sale by auction in separate lots; but no *192] sale of any lot then *took place. On the 30th of April, 1863, a verbal agreement was made between the said Francis Graham and the defendant, with the consent of the said Edwin Hough, for the purchase by the defendant, by private contract, of lot 6; and, on the 12th of May, 1863, an agreement in writing embodying the terms of the said verbal agreement, and which agreement in writing had been prepared on and dated the 30th of April, 1863, was signed by the said Francis Graham and the defendant.(a) The conditions of

(a) This agreement was written at the foot of the conditions, and was as follows:—"Memorandum of agreement made the 30th of April, 1863, between Francis Graham, of, &c., owner of the above-mentioned premises, of the one part, and George Black, of, &c., builder, of the other part, witnesseth that the said Francis Graham doth hereby declare the said George Black the purchaser of the said premises subject to the above conditions so far as the same are applicable to a sale by private contract, at the price or sum of 419*l.* 4*s.*: And the said George Black doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said Francis Graham, that he the said George Black, his heirs, executors, or ad-

sale referred to in the said agreement contained the following stipulation:—"The purchaser will be required to covenant to build according to the elevation of lot 2, or such other elevation as the vendor shall approve;" and also the following,—“The walls between lot 5 and this lot, and this lot and lot 7, and between lots 7 and 8, and between lots 8 and 9, and between lots 9 and 10, and between lots 10 and 11, shall, when built, be deemed party-walls; and, if erected by the purchaser of any one of such lots, the owner of the adjoining lot shall be bound to pay to him one-half the cost of erecting *such wall, whenever the owner of such adjoining lot shall make use of the [*193 same.” By the expression “elevation of lot 2,” occurring in the said conditions, is meant the elevation of the building then standing on the lot described in the plan as lot 2.

5. On the 26th of May, 1863, an agreement was made between the said Francis Graham and the plaintiff, with the consent of the said Edwin Hough, for the purchase by the plaintiff of lot 7, and an agreement dated May 26th, 1863, (a) was thereupon signed by the plaintiff and the said Francis Graham. The conditions referred to in the said last-mentioned agreement, the plan, and lots referred to in the said last-mentioned conditions, are the same as those referred to in the conditions of sale mentioned in the agreement of the 30th of April, 1863, and signed on the 12th of May, 1863, of which said agreement, and of the conditions referred to therein, the plaintiff had no positive knowledge at the time of his entering into the said agreement of the 26th of May, 1863; but he then had reason to suppose, and did suppose, that the defendant had entered into an agreement corresponding in its terms and conditions with the agreement then entered into by him, the plaintiff.

6. On the 29th of May, 1863, the plaintiff was put into possession by Mr. Graham of lot 7, with Mr. Hough's consent, and continued in possession thereof till the house afterwards erected upon it fell.

7. Lots 6 and 7 so respectively purchased by the plaintiff and defendant were plots of land on which respectively buildings stood at the time of such purchases respectively. The western wall of the old building standing on lot 7 was an ancient wall, having been built above twenty years. It stood on lot 7 *at the time of its purchase by the plaintiff, and remained continuously there until [*194 the fall of the plaintiff's building, as hereinafter mentioned. It extended from Devonshire Street towards the passage parallel with Devonshire Street, described on the plan as “backway to the buildings;” and, when the plaintiff was put into possession, it stood 15 feet above the surface of lot 7. The intended party-wall between lot 6 and lot 7, referred to in the conditions mentioned in the respective agreements of 30th of April, 1863, and 26th of May, 1863, would have cleared every part of the above-mentioned old wall at the front or north end, and for about two-thirds of the length: for the remaining third it would have taken away about 2½ inches of the old wall

ministrators, shall and will well and faithfully pay the said sum of 419*l.* 4*s.* to him the said Francis Graham, his executors or administrators, for and as the purchase-money of the above-mentioned premises accordingly.”

(a) This agreement was in precisely the same form as that set out in p. 192, note (a), relating to lot 6.

below the surface of the ground, but would not have interfered with it above the surface, as the intended party-wall was to be a 14-inch wall below the surface, and a 9-inch wall above the surface. The said old wall is a 14-inch wall throughout, inclusive of the foundation.

8. The plaintiff, on being put into possession, as before mentioned, made preparation for altering and raising the old building so then standing upon lot 7, a verbal understanding having been come to between himself and Mr. Graham at the time of his agreeing to purchase that lot, that the building to be erected by him thereon should not be immediately constructed in accordance with the elevation of lot 2, but that he should be at liberty to put up a temporary building thereon in the first instance. In accordance with this understanding, the plaintiff proposed to effect the alterations of the old building on lot 7 by leaving the western wall of it standing, and raising its height.

9. The plaintiff, with the consent of Mr. Graham, but without the knowledge of Mr. Hough, raised the western wall of the old building *195] to the height of *twenty-four feet from the surface, being nine feet additional to its former height. The wall so raised formed the side of the plaintiff's house next to lot 6. The alterations so made by the plaintiff were completed on the 7th of July, 1863. The raising of this wall and the building of the plaintiff's house made a considerable addition to the weight of the wall as it was before it was raised. About one-third more support was needed for the raised wall and the new house than had been required for the support of the old wall as it stood when the plaintiff was put into possession. When the lateral support of the earth is removed, more labour and material is required or greater risk is incurred in supporting a heavier building than is required or incurred in supporting a lighter building; such increase of labour and material or risk was small in the case of the plaintiff's raised wall, as compared with the wall before it was so raised: but such increase existed, and a builder contracting for the support of the respective buildings would take it into consideration, but would estimate it at less than 20s. The house built by the plaintiff was a lighter house than a house would have been, erected according to the elevation of lot 2.

10. On the 3d of August, 1863, the defendant took possession of lot 6, and made preparations to pull down the old buildings standing upon it, and to build thereon a new house according to his agreement dated the 30th of April, 1863, and the conditions therein referred to; and for that purpose he proceeded to make the excavations in lot 6 for the said new house to be erected thereon. In consequence of the excavations so made, and before they were completed, the plaintiff's building on lot 7 gave way, and on the 1st of September, 1863, fell.

*196] 11. The excavations so made were in accordance *with the defendant's said agreement of the 30th of April, 1863, and the conditions therein referred to; and were such excavations as were required for a building similar to those on lot 2, the elevation of which is referred to in the said conditions. The said excavations were of considerable depth below the surface of lot 6, which was on the same level as the surface of lot 7. They were entirely within lot 6, and, at the time the house fell, had not approached within some feet of the plaintiff's wall. The earth then left unexcavated on lot 6

adjoining lot 7 was more than sufficient to support the earth in lot 7 in its natural state without any superincumbent weight; but it was insufficient to support the earth of lot 7 with the superincumbent weight of the plaintiff's building thereon, as that building was after the wall had been raised; and it was not such as in the opinion of competent builders or architects could have been relied on to support the earth of lot 7 with the superincumbent weight of the old building before it was raised. The probabilities are that the excavations which caused the fall of the plaintiff's house would have caused the fall of the old wall in its unaltered state.

12. The proper means for supporting such a building as the plaintiff's, either in its original or altered state, when the lateral support of the earth adjoining is removed, are, by under-pinning or under-propping, which consists in taking away earth upon which the building stands, and inserting brick pillars, or wooden posts, in its place. This was not done with respect to the plaintiff's house. The only means taken for its support were the placing stays or props against the side of it, which was done on three several occasions, about the 20th, 25th, and 31st of August, when shrinks or cracks showed themselves in the house; but which means were quite insufficient.

*13. After the building had begun to crack, and until [*197 within a day or two of its fall, it might have been saved had the proper means been resorted to; but neither the plaintiff or the defendant would incur the expense of resorting to them. Neither party placed any impediment in the way of the other's supporting the building by any means the other might think proper; and each expressed his readiness to assist the other, disclaiming at the same time his own obligation to support the house, and insisting that such obligation rested on the other. Thus the stays were put up by the co-operation of both, as an act of mutual concession; but the means known by both to be effectual for supporting the house were omitted.

14. No conveyance of either lot 6 to the defendant or of lot 7 to the plaintiff was executed until after the plaintiff's house fell, in the manner stated.

15. The court was to be at liberty to draw all inferences of fact which a jury would be justified in drawing.

The question for the decision of the court was, whether the plaintiff was entitled to recover. If he was entitled to recover, judgment was to be entered for him for 261*l.*, the agreed amount of damages, and costs, to be taxed. If the plaintiff was not entitled to recover, judgment was to be entered for the defendant, with costs, to be taxed.

E. James, Q. C. (with whom was *T. Jones*), for the plaintiff.(a)—Where one who is the owner of an entire *property separates [*198 it and conveys one portion to one purchaser and the other to another, whether simultaneously or not, and in whatever order of

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the plaintiff was entitled to have his house supported by the soil of lot 6:

"2. That the defendant was liable for having so dealt with the soil of lot 6 as to deprive the plaintiff's house of such support:

"That the defendant was liable for having caused the plaintiff's house to fall by reason of his having excavated the soil of lot 6 negligently and without taking the proper, usual, and reasonable precaution for supporting the plaintiff's house."

time, each portion remains impressed with the same burthens and the same rights that belonged to it whilst there was unity of ownership. Thus, when Graham sold lot 6 to the defendant, he reserved to himself the right to have the support of the land of lot 6 for his building on lot 7. This is the rule laid down in Gale on Easements, 3d edit. 83 et seq., founded (amongst others) upon the decision of the Court of Exchequer in *Richards v. Rose*, 9 Exch. 218, that, where several houses belonging to the same owner are built together, so that each requires the mutual support of the neighbouring house, and the owner parts with one of the houses, the right to such mutual support is not thereby lost; the legal presumption being that the owner reserves to himself such right, and at the same time grants to the new owner an equal right: and consequently, if the owner parts with several of the houses at different times, the possessors still enjoy the right to mutual support, the right being wholly independent of the question of the priority of their titles. The case states that the excavation on the defendant's land would have brought down the building on the plaintiff's land as it originally stood: the addition, therefore, to the superincumbent weight, cannot affect the question. In *Jones v. Tapling*, 13 W. Rep. 617, the House of Lords held,—reversing several previous *199] *decisions,—that the owner of a house has no right to obstruct his neighbour's lights because his neighbour has thought fit to enlarge them. The same principle applies here: the plaintiff had a right to build as he did upon his own soil, but his so doing did not deprive the defendant of his right. The additional weight was contemplated by the conditions on which both portions of the property were sold. The rule as laid down in *Richards v. Rose*, is re-affirmed by Parke, B., in *Gayford v. Nicholls*, 9 Exch. 702, 708. The same rule was applied in *Pyer v. Carter*, 1 Hurlst. & N. 916, to the easement of a drain. The plaintiff's and defendant's houses adjoined each other. They had formerly been one house, and were converted into two by the owner of the whole property. Subsequently, the defendant's house was conveyed to him, and after that the plaintiff took a conveyance of his house. At the times of these conveyances a drain ran under the plaintiff's house, and thence under the defendant's, and discharged itself into the common sewer. Water from the eaves of the defendant's house fell on the plaintiff's house, and then ran into a drain on the plaintiff's premises, and thence through the drain into the common sewer. The plaintiff's house was drained through this drain. It was held that the plaintiff was, by implied grant, entitled to have the use of the drain as it was used at the time of the defendant's purchase of his house. Watson, B., in delivering the judgment of the court, there says: "It seems in accordance with reason, that, where the owner of two or more adjoining houses sells and conveys one of the houses to a purchaser, that such house in his hands should be entitled to the benefit of all the drains from his house, and subject to all the drains then necessarily used for the enjoyment of the adjoining house, and that without express reservation or grant, inasmuch as he purchases the house *such as it is*."

*200] *If that were not so, the inconveniences and nuisances in towns must be very great. The same law must apply to all kinds of easements. *Brown v. Robins*, 4 Hurlst. & N. 186, is a very

strong case. There, the plaintiff was owner of a house erected in 1834 on solid ground. Previously to the building of the house, a portion of the minerals had been gotten under a garden which adjoined the house. In 1838, a portion of the minerals was gotten under the defendant's land, which adjoined the garden. In 1855, the defendant commenced getting out the rest of the minerals under his land. In 1857, the plaintiff's land sank, and the house was injured by the defendant's mining operations. It was found by the jury that the sinking of the plaintiff's land was caused by the defendant's workings; that some damage would have happened, but not to the same extent, if the garden ground had been left solid; that the defendant knew of the excavations under the garden; that the land would have sunk in just the same whether there was a house on it or not; and, lastly, that the damage to the plaintiff's house by the sinking was 300*l.*,—250*l.* occasioned solely by the defendant's workings, and 50*l.* damages caused in part by the excavation under the garden. It was held,—first, that, inasmuch as the sinking of the plaintiff's land was in no way caused by the weight of the house, the plaintiff was entitled to recover whether he had acquired a right to support for his foundations by the defendant's soil, or not,—secondly, that, although the excavation under the garden contributed to the extent of 50*l.* to cause the damage, the plaintiff was entitled to the whole 300*l.*, because, if the defendant had not done the wrongful act complained of, no part of the damage would have occurred. *Stroyan v. Knowles*, 6 Hurlst. & N. 454, was decided upon the same principle. To the same effect is the judgment of *Lord Cranworth, C., in *The Caledonian Railway Company v. Sprot*, 2 Macq. 449. In *Dugdale v. Robertson*, 3 K. & J. 695, it was held that there is a *prima facie* inference at common law, upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right of support; and that, in the absence of express words showing clearly that he has waived or qualified his right, the presumption is that what he retains is to be enjoyed by him *modo et forma*, and with the natural support which it possessed before the demise. In *The North Eastern Railway Company v. Elliott*, 29 Law J., Ch. 808, it was held, that, although, as between conterminous owners, the lateral support of a neighbour's soil can only be claimed for the surface of the land in its natural state, yet, where a person sells land to another, to be used for an express purpose, he will not be allowed to derogate from his own grant by doing anything in the adjacent soil which unfits the land sold for the purpose for which it was sold. Vice-Chancellor Page Wood, in delivering judgment, there says: "I have to consider what, looking to all the authorities, should be the application of those authorities to a state of circumstances such as this. The soil which is bought by the company of the proprietor Mr. Boulcott, has a natural support, if I may so call it, that is, the support of the original earth, to the extent that these pillars are not removed, and has also the additional support of the water under the circumstances of the accident which took place;(a) which state of things has been allowed

(a) The flooding of the defendant's mine.

to continue for forty years. The authorities,—especially *The Caledonian Railway Company v. Sprot*,—have determined, that, first, at *202] common law, wholly *independent of any question of conveyance by the one owner to the other, and the two owners being at arm's length, it may be, and having no connection with each other, there exists the right to have the soil in its natural state supported by the adjacent soil of the owner of the adjoining property; and that owner can do nothing by removing any portion of his soil, either from below if it happens to be so situate, or laterally if it is adjacent, which will occasion the falling in of the adjoining soil from its natural state. The common law gives no further right: and, if a man choose to build on his soil, and so to place an additional weight upon it, he is not entitled to any support for that additional weight. Where, however, the case is not that of two independent landowners, but of the owner of two closes conveying one of those closes to another person, there he can do nothing derogating from his own grant; and, if he has conveyed it for the express purpose of having buildings erected upon it, he then enters into an implied contract that he will do nothing to his soil which will prevent the soil he has granted from being able to serve the purpose for which, to his own knowledge, he has conveyed it; and the person who acquired the soil under these circumstances has the additional right of having support for the buildings, or for whatever else may be the object for which he has purchased the soil. This is the law, as decided by *The Caledonian Railway Company v. Sprot*." These authorities, it is submitted, abundantly show that the plaintiff is entitled to recover for the damage done to his premises.

Manisty, Q. C. (with whom was *Kemplay*), for the defendant.(a)—
 *203] The plaintiff had no such right of *support from the defendant's land as to entitle him to maintain this action. The authorities referred to have no application. This case must be determined upon the contract and the specific facts found in the special case. The plaintiff cannot stand in any better position than his vendor stood in after he had entered into the contract he did with the defendant. Now, what was the state of things at that time? The vendor, Francis Graham, was the owner of several plots of land which had been laid out for building purposes. Graham having that object in view, some of the sites having already been sold, lot 2, which had been built

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That, on the facts stated in the case, the plaintiff is not entitled to recover from the defendant for the damages sustained by the falling of his building:

"2. That the excavations made by the defendant in lot 6 were such as under the circumstances stated he was entitled to make without underpinning or underpropping the plaintiff's building:

"3. That, under the circumstances stated, the plaintiff was not entitled, either for his old building, or for his altered building, to the support of the soil of lot 6 which was removed by the defendant in making his excavations in that lot:

"4. That, under the circumstances stated, the defendant was under no obligation to underpin or underprop the plaintiff's building:

"5. That, under the circumstances stated, the defendant had been guilty of no breach of duty or wrongful act for which the plaintiff was entitled to maintain this action:

"6. That the plaintiff became possessed of lot 7 and the building thereon, subject to the right of the defendant to pull down the old buildings standing on lot 6, and to build thereon a new house, according to the agreement of the 30th of April, 1863, and the conditions therein referred to, and for that purpose to make the excavations in lot 6 without underpinning or underpropping the plaintiff's building."

upon, was taken as the standard for the elevation of the houses to be erected on the other lots; and, accordingly, Graham sold lot 6 to the defendant under a contract which imposed it upon him as a condition *that he should erect a building upon that lot "according to [*204 the elevation of lot 2, or such other elevation as the vendor should approve." Lot 7 was not at that time sold. By the conditions of sale, a wall between lots 6 and 7 was to be built, and the person building it was to receive from his neighbour one-half of the cost thereof, if he used it as a party-wall. The case expressly finds, in paragraph 11, that the excavations made by the defendant on his land were in accordance with his agreement, and were such excavations as were required for a building similar to those on lot 2. It also finds that enough earth of lot 6 was left unexcavated to support lot 7 in its natural state, and without the superincumbent weight placed there by the plaintiff. The next paragraph shows that the proper means for supporting the plaintiff's premises could not be resorted to without going upon his land. This the defendant would not be authorized to do, and consequently the law casts no duty upon him to do so. [BYLES, J.—Suppose this had been the case of a license to build on the adjoining land,—would that have been subject to the implied condition that the licensee should not so build as to injure a structure belonging to licensor?] This is a stronger case than that. The defendant is not only licensed, but *required* to build in a given manner. For these reasons, it is submitted that none of the cases referred to have any analogy whatever to the present.

E. James, Q. C., in reply.—The defendant was under no obligation to build at all: but, if he did build, he was bound to do so with due regard to the rights which the vendor reserved to himself or his assigns.

ERLE, C. J.—I am of opinion that our judgment in this case should be for the defendant. The action is *brought against him by [*205 an adjoining owner for damage alleged to have been sustained by the plaintiff by reason of his (the defendant's) having excavated the soil of his own land, and so deprived the plaintiff's land of the lateral support to which he claims to be entitled. The plaintiff is the owner of a piece of land described in the case as lot 7, and the defendant is the owner of lot 6: each of them became possessed in the course of the year 1863; the conveyance to the defendant being in April, the conveyance to the plaintiff in May of that year. Down to the time of these several conveyances, there was unity of possession in Francis Graham. The plaintiff under these circumstances stands in the same position precisely as if lot 7 had remained in the vendor. If there had been a simple conveyance to the defendant of lot 6, lot 7 would have been entitled to support, as well at law as in equity, according to the series of authorities cited by Mr. James. But the question is whether there is not in the conveyance of the 30th of April, 1863, that which justifies what otherwise would have been an actionable wrong on the part of the defendant. If the defendant had simply dug so near the plaintiff's land as to deprive it of the lateral support it was entitled to, he would no doubt have been liable to an action. But here the vendor, being the owner of both lots, sells lot 6 to the defendant; and, according to the terms of the contract by which

it is conveyed to him, he makes it obligatory on him to do, or, at all events, within the provisions of that contract, he was only doing his duty to his vendor when he did, the act which brought down the plaintiff's house. That is how the case stands on the title between these parties. It seems to me also to be a point well worthy of consideration, whether, assuming that the plaintiff was entitled to the *206] lateral support of lot 6, he was entitled *to such lateral support for a building of much greater weight than that which originally stood upon it. If the matter were gone into, it seems to me that there is good ground for saying that by imposing a heavier burthen on the land he would lose the right which he otherwise would have had. Upon the first ground, however, I am clearly of opinion that the defendant is entitled to judgment.

WILLES, J.—I am of the same opinion. This case has been argued, first, with reference to the plaintiff's right to the support of the adjoining land, secondly, with reference to the contract under which the defendant became the purchaser of his land. If the plaintiff had the right he asserts, it seems to me that that which my Lord has just adverted to puts an end to it. It is not like the case of a man, having one ancient window, opening out another. Where an addition is made to the weight of a building, the whole must be considered as one entire weight: as, if a carpenter undertake to make a table capable of sustaining a pressure of 1 cwt., and the customer puts half a ton upon it, and it breaks in consequence, the latter cannot complain that the former has failed to perform what he undertook to do. I think the plaintiff has by his own act destroyed a right which the law would otherwise have given him. Viewing it as a matter of contract, I am also of opinion that the defendant is entitled to judgment. He has done no more than by his engagement with his vendor he was bound to do, or at all events justified in doing.

BYLES, J.—I am of the same opinion. Had there been no special contract here, and no superponderate weight upon the old wall, the cases referred to by Mr. James might have applied. But I think Mr. Manisty was right when he said that the consideration of those *207] *authorities was unnecessary here. The vendor not only licensed, but obliged the defendant by his contract to build as he has done. There is no stipulation requiring him to underprop the adjoining building, or to give notice to any one: and, if there had been anything requiring him to give notice, the 13th paragraph of the special case shows that the plaintiff had notice of what was going on. It is agreed that the defendant did nothing more than he was obliged to do. There was no proof here of the extent of the plaintiff's addition to the superincumbent weight of the building on lot 7: the impossibility, therefore, of saying how much of the damage (if any) was caused by the act of the plaintiff himself. Upon both grounds, I am of opinion that the defendant is entitled to judgment.

MONTAGUE SMITH, J.—I also am of opinion that the defendant is entitled to judgment. It is not denied that *primâ facie* the owner of land is entitled to the lateral support of the land of his neighbour. The right is an implied one, and capable of being rebutted by the existence of stipulations which are inconsistent with it. It seems to me that there are such stipulations here. The vendor, when he agreed

to sell lot 6 to the defendant, put him under an obligation, or at all events licensed him, to do as he did. He must have contemplated the consequences which ensued. His own wall might have cracked, even if no addition had been made to it. Was it the defendant's duty under the circumstances to prop up the wall, or the plaintiff's? I think the latter; and that, upon the true construction of the stipulations in his agreement, the defendant is not liable for the injury done to the plaintiff's building. Upon the other point, it is unnecessary to give any opinion. My judgment turns upon the contract.

*WILLES, J.—I would wish to refer to a case which has a [*208 considerable bearing upon the subject in hand, viz. *Rowbotham v. Wilson*, 6 Ellis & B. 593 (E. C. L. R. vol. 88). That was an action for injuring the plaintiff's reversion, by removing the minerals without leaving support to the surface, on which were houses more than twenty years old; whereby the houses were injured. On a special case it appeared, that, ninety years before the action, the locus in quo was enclosed by an award made under an enclosure act; that the surface was allotted to one Pears, whose estate the plaintiff had, and the minerals to one Howlett, whose estate the defendant had; that, on the face of the award, it was stipulated that the allottees of the mines should have liberty to work the mines, and the allottees of the surface should have no claim to compensation for any consequent sinking of the surface. Pears executed the award as a deed. Howlett did not execute it, but accepted the allotment under it. The houses were afterwards built. By the defendant's mining, without negligence, the surface unavoidably sank. It was held by the Court of Queen's Bench that it sufficiently appeared, that, upon the severance of the minerals and the surface, the owner of the surface took it as a separate tenement with only a qualified right of support; that no further right of support was gained by the erection of the houses, though they had stood for more than twenty years; that the subsequent owners of the surface took it with only the qualified right of support originally created; and that therefore the plaintiff was not entitled to maintain the action. That decision was affirmed by a majority of the judges in the Exchequer Chamber (8 Ellis & B. 123 (E. C. L. R. vol. 92)), and also by the House of Lords,—see 8 House of Lords Cases 348.

Judgment for the defendant.

*MOCKFORD *v.* TAYLOR. *May* 31. [*209

A count for the conversion and a count for the detention of goods ought not to be allowed, unless a judge at chambers is satisfied that substantial justice requires that they should be joined.

THIS was an action brought by assignees to recover the stock in trade and household furniture of the bankrupt. The first count was for the conversion of the goods, describing them; the second was in detinue for "goods of a similar description to those in the first count mentioned."

An application had been made to Montague Smith, J., at Chambers, founded upon an affidavit that the same goods were sought to be

recovered under both counts, to strike out the second count, pursuant to rules 1 and 2 of Hilary Term, 1853 (see 13 C. B. 87 (E. C. L. R. vol. 76)), the first of which is, that, "Except as hereinafter provided, several counts on the same cause of action shall not be allowed, and any count or counts used in violation of this rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended by the court or a judge, on such terms as to costs or otherwise as the court or judge may think fit:" and the second, that "several pleas, replications, or subsequent pleadings, or several avowries or cognisances founded on the same ground of answer, &c., shall not be allowed: provided that, on an application to the court or a judge to strike out any count, or on an objection taken before the judge, on a summons to plead several matters, to the allowance of several pleas, replications, or subsequent pleadings, avowries, or cognisances, on the ground of such count, &c., being in violation of this rule, the court or judge may allow such counts on the same cause of action, or such pleas, replications, or subsequent pleadings, or such avowries or cognisances, *210] founded on the same ground of answer or defence, as *may appear to such court or judge to be proper for the determining the real question in controversy between the parties on its merits, subject to such terms as to costs and otherwise as the court or judge may think fit." The learned judge, however, declined to interfere.

Tapping now moved for a rule calling upon the plaintiff to show cause why the second count should not be struck out. He referred to Day's Common Law Procedure Act, 2d edit. p. 387, where it is said that Willes, J., had always discountenanced the joinder of these two counts; and he observed that the two could not properly be joined, inasmuch as the judgment in trover passes the property in the goods. [WILLES, J.—On payment. The solutio pretii is the foundation of that doctrine. There is, however, a stronger objection than that, and it is two-fold,—first, the difficulty of pleading two counts for the same goods; and, secondly, that before the Common Law Procedure Act these two counts could not be joined, and now the two are only allowed if the judge thinks fit, and upon such terms as he may think it right to impose.] It was further objected that there was no specific description of the goods in the detinue count, as is required by the form given in the Common Law Procedure Act, 1852.

Hance now showed cause.—In trover, the plaintiff can only recover the value of the chattels; but, in detinue, under the Common Law Procedure Act, he may have the identical goods, under a judge's order. "Before the Common Law Procedure Act, 1854,"—Bullen & Leake, 2d edit. 272,—"the defendant, under the judgment in this action, had the option to deliver the goods, or to retain them and pay the value assessed by the jury: *Phillips v. Jones*, 15 Q. B. 859 (E. C. L. R. vol. 69). By s. 78 of *that act 'the court or a judge *211] shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed; and that, if the said chattel cannot be found, and unless the court or judge should otherwise order,

the sheriff shall distrain the defendant by all his land and chattels in the said sheriff's bailiwick till the defendant renders such chattel, or, at the option of the plaintiff, that he cause to be made of the plaintiff's goods the assessed value of such chattel; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action.'"² There can be no reason, therefore, why the two counts should not be allowed. They are not founded upon the same cause of action. [WILLES, J.—There is great difficulty in keeping a count in detinue with a count in trover. There is a section in the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, which was intended to meet that difficulty: but still it is a difficulty.] That was the 25th section, which enacts, that, "in any action for detaining the goods of the plaintiff, it shall be lawful for the defendant, by leave of the court or a judge, and upon such terms as they or he shall think fit, to pay into court a sum of money to answer the claim of the plaintiff to the value of the goods alleged to be detained." There may be good reasons why the plaintiff should wish to retain the two counts, and it is difficult to see how the defendant can be prejudiced thereby. It will not add much to the length of the record.

Tapping, contra, was not called upon.

ERLE, C. J.—This is properly a matter which ought *to be [*212 disposed of at Chambers. We are, therefore, desirous that the parties should go back to my Brother Montague Smith with an intimation of our opinion that the sounder practice generally is, to allow a single count in trover or detinue only, and not both together; subject, however, to the plaintiff satisfying the judge that there is a substantial reason for having both.

WILLES, J.—It is inconvenient to have a count in trover and a count in detinue for the same goods: and it is no answer to the objection to say that it adds little to the length of the record. There might, no doubt, be good reasons for allowing the two: but that is for a judge at Chambers to determine.

BYLES, J., and KEATING, J., concurred.

Hance elected to strike out the count for the detention of the goods. Rule accordingly.(a)

(a) In *Kettle v. Bromsall*, Willes 118, Serjt. Comyns cited *Buckmere's Case*, 8 Co. Rep. 87 b, to show that trover and detinue cannot be joined,—“because they require different pleas.” To this Mr. Durnford adds a note,—“Not only the *pleas*, but the *judgments* also are different: in trover, only damages can be recovered, but in detinue the things themselves, or their value, may be recovered. And two counts cannot be joined in the same declaration, unless the same judgment may be given on both: *Brown v. Dixon*, 1 T. R. 274. See also *Gilb. Hist. C. B.* 6, 7.”

***213] *ALTON and Another v. THE MIDLAND RAILWAY COMPANY. May 9.**

1. One who is no party to a contract cannot sue in respect of the breach of a duty arising out of the contract.

2. An action will not lie against a railway company, as carriers of passengers for hire, at the suit of a master, for a personal injury sustained through their negligence by his servant, whereby the master lost the benefit of the services of the servant,—the contract out of which arose the duty to carry safely being a contract between the company and the servant.

THIS was an action by the plaintiffs, who were brewers, against the Midland Railway Company, for the loss of the services of a traveller in their employ, through the defendants' negligence.

The declaration stated that one Charles Thomas Baxter, before and at the time of the committing of the grievances thereafter mentioned, was, and from thence hitherto had continued, and still was, the servant and traveller of the plaintiffs in their business of brewers and otherwise; that the defendants were carriers of passengers upon a certain railway, to wit, the Midland Railway, from a certain station of the defendants at Trent to a certain other station of the defendants at Nottingham, for hire and reward to the defendants; that the said C. T. Baxter, so being the servant and traveller of the plaintiffs as aforesaid, became and was received by the defendants as a passenger to be by them safely and securely carried upon the said railway on a journey from the said station of the defendants at Trent to the said station of the defendants at Nottingham, for hire and reward to the defendants in that behalf; that thereupon it became and was *the duty* of the defendants to use due and proper care and diligence in and about the carriage and conveyance of the said C. T. Baxter, so being such servant and traveller of the plaintiffs as aforesaid, upon the said railway, on the said journey: yet that the defendants did not safely and securely carry the said C. T. Baxter, so being such servant and traveller of the plaintiffs as aforesaid, upon the said railway, on the ***214]** said journey, and did not use due and ***proper** care and diligence in and about the carriage and conveyance of the said C. T. Baxter, so being such servant and traveller of the plaintiffs as aforesaid; and by their servants so negligently, unskilfully, carelessly, and improperly behaved and conducted themselves in that behalf, that the said C. T. Baxter, so being such servant and traveller of the plaintiffs as aforesaid, was thereby and by reason of the negligence, carelessness, unskilfulness, and improper conduct of the defendants and their servants, wounded and injured, and became and was sick, disabled, and unable to attend to the necessary business of the plaintiffs, about which he was employed at the time of the injuries complained of, and so remained from thence for a long time, to wit, for nineteen weeks; whereby the plaintiffs during all such time lost the services of the said C. T. Baxter in their said business, and all benefits and advantages which would otherwise have accrued to them from such services, and the said business of the plaintiffs so carried on by the said C. T. Baxter suffered great loss and injury, and the plaintiffs were by reason of the premises, and of the wrongful and improper conduct of the defendants, otherwise injured and damnified: Claim 500*l*.

To this declaration, the defendants pleaded, that they contracted

with the said C. T. Baxter to carry him as such passenger as in the declaration mentioned, on the said journey, and that they received him as in the declaration mentioned under and by virtue of that contract, and they did not contract with the plaintiffs to carry the said C. T. Baxter; and that the matter complained of in the declaration was not a breach of any contract between the defendants and the plaintiffs, but was a breach of the said contract between the defendants and the said C. T. Baxter.

The defendants also demurred to the declaration, *the ground of demurrer stated in the margin being, "that the defendants [*215 are not liable to third persons for breach of the contract between their passenger and themselves." Joinder.

The plaintiffs took issue on the plea, and also demurred thereto, alleging for ground "that the facts stated in the plea afford no answer to the action." Joinder.

David Keane, Q. C. (with whom was *Graham*), for the plaintiffs.(a) —The question is, whether a railway company whose servants have been guilty of negligence in carrying as a passenger a servant of a manufacturer, is liable to the latter for the injury which has deprived him of his services. Railway companies, who hold themselves out as carriers of passengers or goods, are *subject to all the liabilities of common carriers: *Chitty & Temple on Carriers* 16, 17; [*216 *Hodges on Railways*, 4th edit. 501; *Carpue v. The London and Brighton Railway Company*, 5 Q. B. 747 (E. C. L. R. vol. 48); *Crouch v. The London and North Western Railway Company*, 14 C. B. 255 (E. C. L. R. vol. 78). The 86th section of the 8 & 9 Vict. c. 20, which enacts that "it shall be lawful for the company to use and employ locomotive engines or other moving power, and carriages and wagons to be drawn or propelled thereby, and to carry and convey upon the railway all such passengers and goods as shall be offered to them for that purpose, and to make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the tolls by the special act authorized to be taken by them," contains a pretty accurate description of the duties of common carriers. Proof of a contract is not necessary to support an action against common carriers; they might be sued in an action on the case for the injury as arising ex delicto, and such an action is not necessarily to be considered as founded on contract: *Bretherton v. Wood*, 6 J. B. Moore

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That a duty is imposed by law on the defendants, as carriers of passengers, to carry with due and proper care all persons who are lawfully travelling on their railway, and that they are liable for any injury which is the direct consequence of a breach of such duty:

"2. That such duty arises on the receipt of a passenger to be carried, and is totally independent and irrespective of any contract:

"3. That the injury sustained by the plaintiffs is the direct consequence of the defendants' negligence:

"4. That the said C. T. Baxter was travelling on the business of the plaintiffs, and was their agent in making the contract with the defendants:

"5. That the declaration discloses a good cause of action:

"6. That the plea is bad, because it does not aver that there was any special contract limiting the defendants' liability, or any other contract than such as would be implied by law from the fact of the said C. T. Baxter becoming and being received by the defendants as a passenger on their railway:

"7. That the facts stated in the plea afford no answer to the action."

141 (E. C. L. R. vol. 17); 9 Price 408; 3 Brod. & B. 54 (E. C. L. R. vol. 7). Their duty is independent of any contract made by them: Pozzi v. Shipton, 8 Ad. & E. 968 (E. C. L. R. vol. 35); 1 P. & D. 4. That explains away some of the difficulties raised by the plea. In Marshall v. The York, Newcastle, and Berwick Railway Company, 11 C. B. 655 (E. C. L. R. vol. 73), a declaration in case against a railway company for the loss of a passenger's luggage, stated that the defendants received the passenger to be safely carried, together with his luggage, "for reward to the defendants in that behalf:" it then alleged that it was the defendants' duty safely and securely to carry the plaintiff and his luggage, and averred a breach of that duty, whereby the luggage was lost, and it was held, that, the action *217] being founded on the breach of duty, and not on *contract, it was not necessary to allege or to prove that the reward was to be paid *by the plaintiff*; but that the plaintiff was entitled to recover, although it appeared that the fare was paid by the plaintiff's master, with whom he was travelling at the time. In Tattan v. The Great Western Railway Company, 2 Ellis & Ellis 844 (E. C. L. R. vol. 105), it was held that an action against a common carrier for the breach of his duty to carry safely goods delivered to him as such to be carried for hire, whereby the goods are lost, is an action not of contract, but of tort, in substance as well as in form; the duty being imposed upon him by the custom of the realm, and being distinct from and independent of his obligation under the contract of carriage, in respect of which latter he might also be sued in an action of contract: and therefore that the plaintiff, in an action against a common carrier for the breach of the duty in question, brought in a superior court to recover a sum not exceeding 20*l.*, is not deprived of his costs by the 19 & 20 Vict. c. 108, s. 30, if the defendant suffers judgment by default, for that the action is not one of contract within that section. In giving judgment, Cockburn, C. J., says: "Whatever may be the distinction between an obligation arising out of a contract and a duty imposed by the common law on persons entering into a contract, it is impossible to refer to the cases to which our attention has been called, without seeing that they establish that a duty was imposed upon the defendants in the present case, by the custom of the realm, so soon as they entered into the contract with the plaintiff, and independently of the terms of the contract itself. The plaintiff might, had he thought fit, have brought his action on the contract; but he was also entitled to sue the defendants for the breach of their common-law duty. Having chosen the latter course, *218] he cannot, according to the authorities, be said *to have brought an action of contract; although, therefore, he has recovered less than 20*l.* by a judgment by default, he is not deprived of his costs by the statute 19 & 20 Vict. c. 108, s. 30. The action is an action on the case, not in form only, but in substance." In Lumley v. Gye, 2 Ellis & B. 216 (E. C. L. R. vol. 105), the plaintiff was held to be entitled to recover damages against the defendant for enticing away a dramatic artiste. In Smith's Master and Servant, 2d edit. 96, it is said that "numerous instances are to be found in the books, of actions by masters for personal injuries to their servants, whether caused by an assault (Gilbert v. Schwenck, 14 M. & W. 488) or by

battery (*Duel v. Harding*, Stra. 595), or by negligent driving (*Hall v. Hollander*, 4 B. & C. 660 (E. C. L. R. vol. 10), 7 D. & R. 133 (E. C. L. R. vol. 16); *Martinez v. Gerber*, 3 M. & G. 88 (E. C. L. R. vol. 42), 3 Scott N. R. 386, *Gough v. Brian*, 2 M. & W. 770), or by a ferocious dog (*Hodsoll v. Stallebrass*, 11 Ad. & E. 301 (E. C. L. R. vol. 39), 3 P. & D. 200, 8 Dowl. P. C. 482)." In *Martinez v. Gerber*, 3 M. & G. 88 (E. C. L. R. vol. 42), 3 Scott N. R. 386, it was held that case, per quod servitium amisit, may be maintained by the master, although the injury done to the servant was not direct, but consequential, and the servant could not have maintained an action of trespass for such injury, but must have sued in case. The argument in arrest of judgment there was, that, "where a servant can maintain trespass, or where, as in a case of seduction, the servant has no right of action, a master may maintain an action on the case for the loss of service: but where, as here, the remedy of the servant is in case, the master cannot support an action, the injury being too remote, as it is a consequence upon a consequence." But Maule, J., said: "The injury to the servant and that to the master are *collateral* to each other, and not consequent upon one another." Serjeant Manning in a note refers to a writ for a master in Reg. Brev. 95 a. **Quare vi et armis mansum ipsius A. apud H. obsederunt, et homines et servientes suos extra mansum prædictum existentes, idem mansum, ad servitium et commodum ipsius A. inibi faciendum, ingredi, et quosdam alios homines et servientes suos, inibi existentes, mansum prædictum, ad terram ejusdem A. excolendum, et ad alia negotia ibidem facienda, exire, non permiserunt: per quod,*" &c. [WILLES, J.—I am not aware of any instance in which the right of a master to maintain an action for a damage done to his servant, has been extended to the case of an injury resulting from the breach of a duty arising (as this does) out of a contract. No inconvenience has been found to result from that state of things: much might result from holding otherwise. Changing the form of the action cannot alter the liability of the defendant.] This is not the case of a duty arising out of a contract. The duty arises from the defendants' holding themselves out as common carriers. [BYLES, J.—I am not aware of any authority for an action of this sort.] The mere absence of a precedent is not conclusive: the principle being ascertained, it is the duty of the court to apply it to the instance. When an individual or a company professes the trade of a common carrier, certain duties and obligations follow, amongst others, to carry safely if a human being, to insure in the case of goods: it is not because there is a collateral contract for remuneration that the duty is gone. In *The Great Northern Railway Company v. Harrison*, 10 Exch. 376, the defendants, a railway company, were in the practice of allowing the reporters of a London newspaper, when going to country races on the defendants' line for the purpose of framing their reports, to travel on the defendants' line carriage free. The reporter was for such purpose supplied with a ticket by the company, which had written upon it the name of *a person in the reporting department. The ticket also pur- [*219
[*220
ported on the face of it to be not transferable; and there was also a memorandum on it, to the effect that any party other than the person named in it using the pass, would be liable to the penalty which a

passenger incurs by travelling without having paid his fare, or that he should be liable to pay the fare: but it did not distinctly appear which of these two liabilities was stated in the memorandum, and, if the former, it did not appear what the penalties were which were alluded to. The plaintiff, acting *bonâ fide*, and going on the business of the journal, and entitled by the usage to have the benefit of a ticket with his name on it, went to the station with a ticket such as that described. His name, however, was not upon it, but there was that of another person, who, however, was a reporter and in the same department with himself. The plaintiff showed this ticket to the porter at the station whose business it was to examine passengers' tickets, who said that it was all right, and placed the plaintiff in a carriage. There was no distinct evidence, however, that the porter knew personally who the plaintiff was. It appeared that the plaintiff and other reporters had, on several occasions before, travelled with similar tickets not bearing the names on them of those who used them; and there was evidence that the persons whose names were on the tickets were personally known to some of the officers and servants at the station. In an action by the plaintiff against the company for an injury received on their line whilst travelling in one of the company's carriages, in which the declaration alleged that "the plaintiff then lawfully was," and which allegation was denied by the plea, the question having been left to the jury, and a verdict having been found for the plaintiff,—it was held, on error on a bill of exceptions, that there

*221] was *evidence for the jury in support of the issue, and that the question was rightly left to them. There was not the remotest shade of contract there. [WILLES, J.—I do not agree that there was no contract in that case. It is often worth a banker's while to remit money without charging a commission; but the taking the money is sufficient in such a case to raise a contract. So, the permitting persons sending goods to a railway station to have the use of a crane there for the purpose of loading and unloading, was held (*Blakemore v. The Bristol and Exeter Railway Company*, 8 Ellis & B. 1035 (E. C. L. R. vol. 92)) to raise a contract or a duty to have the crane sufficient for the purpose. So, in the case of a bailment, the acceptance of it raises an obligation *quasi ex contractu* to use the thing in a proper manner. So, as to the carriage of passengers. These are all obligations arising out of contract.] The contract is mere accident: the foundation of the action in all these cases is a duty. In *Ansell v. Waterhouse*, 6 M. & Selw. 385, a declaration charging the defendant as proprietor of a common stage-coach for carrying passengers from London to Manchester for hire, and that he received M. (the wife of the plaintiff) as a passenger to be safely carried from Manchester to London for a certain fare, and by reason thereof ought carefully to have carried her, yet that the defendant, not regarding his duty, conducted himself so carelessly that by the negligence of him and his servants, and for want of due care and attention to his duty, the coach was overturned, whereby M. was injured, &c., was held to be a declaration in tort. Lord Ellenborough there says: "The practice of declaring against common carriers on the custom of the realm is as ancient as the law itself, and was uniformly adopted until somewhere about the time of *Dale v. Hall*, 1 Wils. 281. Since then it has been

usual not to declare in this form, but in contract; yet the [*222] modern use does not supersede, although it has supplanted, the former practice of declaring in tort. The advantage of proceeding on the custom of the realm, is, that the plaintiff may sue one or more of several tort-feasors, for, in tort, all the parties need not be joined. Looking at the declaration now in question, I do not find one word sounding in contract. What, then, is there to oust the plaintiff of the benefit of declaring on the custom, with all its consequences? It is said the defendant is not charged verbatim as a common carrier, upon the custom; but the declaration is tantamount; for, it charges him as the proprietor of a common stage-coach for hire, and alleges the negligence as a breach of duty arising out of the employment for hire and reward." Bayley, J., says: "There is a broad distinction in personal actions between tort and assumpsit, or such actions as arise *ex contractu* and *ex delicto* which are founded upon contracts, or for wrongs independently of contract. Now, the present action is founded altogether on a misfeasance or breach of the particular duty imposed by law on this defendant." Abbott, J., says: "This decision will not interfere with any of those which have been cited on the other side; because, in those, although the declaration alleged a breach of duty, it appeared that the duty arose out of a special contract, and not out of a general obligation of law. All that I understand to have been decided in those cases, is, that, when it is in substance a contract, the rights of parties shall not be changed by the form of declaration. In the present case, however, the duty, as it seems to me, attaches entirely on the defendant from the general obligation cast upon him by law as a common carrier." And Holroyd, J., adds: "This action is founded on what is collateral to contract; for, the terms of contract with a common carrier, provided they do not vary his general responsibility, are quite [*223] immaterial." Here, the plaintiffs rely upon the general obligation cast by the law upon common carriers. In *Bretherton v. Wood*, 3 Brod. & B. 54 (E. C. L. R. vol. 7), 6 J. B. Moore 141 (E. C. L. R. vol. 17), 9 Price 408, in an action on the case against ten defendants as proprietors of a coach, for injuries sustained by the plaintiff, a passenger, in consequence of negligence in driving, whereby the coach was upset, the jury found a verdict against eight of the defendants, and in favour of other two, and judgment was entered accordingly: and that judgment was affirmed on error. Dallas, C. J., in delivering the judgment of the Exchequer Chamber, says: "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, *which action wants not the aid of a contract to support it.*" And, after commenting on the cases of *Powell v. Layton*, 2 N. R. 365, and *Max v. Roberts*, 12 East 89, his Lordship adds: "In the present case, a duty was imposed on the defendants, which did not arise by the contract, but by the custom or common law of England." [BYLES, J.—That case only establishes, as many more do, that, so far as the parties are concerned, it may be treated as a

matter of tort.] Pozzi v. Shipton, 8 Ad. & E. 963 (E. C. L. R. vol. 35), 1 P. & D. 4, is a still stronger authority for the plaintiffs. There, the declaration stated that the plaintiff delivered to the defendants, and they accepted and received from him, goods to be taken care of and carried and conveyed by the defendants from Liverpool to Birmingham, and there delivered to Pensey for the plaintiff, for reasonable reward to the defendants in that behalf, and thereupon it became

*224] the *duty of the defendants to take due care of such goods while they so had the charge thereof for the purpose aforesaid, and to take due and reasonable care in and about the conveyance and delivery thereof as aforesaid: yet that the defendants, not regarding their duty in that behalf, but contriving, &c., did not nor would take due care, &c., but, on the contrary, whilst they had charge, &c., took such bad care, &c., that the goods were injured, to the plaintiff's damage, &c. The defendants pleaded not guilty, and a traverse of the delivery and acceptance modo et formâ. On the trial, the plaintiff gave no proof of an express contract, but endeavoured to show that the defendants were common carriers. No objection was taken to the course of the evidence. The case was proved as to one defendant only, who was shown to be a common carrier, and a verdict was taken against him and for the other defendant. On motion to enter a nonsuit, on the ground that the action was founded in contract, and therefore a verdict could not pass against one defendant only, it was held that the declaration *might*, and therefore *must* after verdict, be read as a declaration against carriers on the custom of the realm, and consequently that the verdict was maintainable. Patteson, J., in delivering judgment, says: "The declaration does not state that the goods were delivered to the defendants at their special instance and request, nor contain any other allegation necessarily applicable to an express contract only, or even pointing to any express contract. We cannot therefore say that it shows the action to be founded on contract: and it is sufficient for the present purpose, if the language in which it is couched is consistent with its being founded on the general custom as to carriers." In Marshall v. The York, Newcastle, and Berwick Railway Company, 11 C. B. 655 (E. C. L. R. vol. 73), a declaration in case against a railway company for the loss of a passenger's luggage stated

*225] that the *defendants received the passenger, to be safely carried, together with his luggage, "for reward to the defendants in that behalf:" it then alleged that it was the defendants' duty safely and securely to carry the plaintiff and his luggage, and averred a breach of that duty, whereby the luggage was lost: and it was held, that, the action being founded on the breach of duty, and not on contract, it was not necessary to allege or to prove that the reward was to be paid *by the plaintiff*; but that the plaintiff was entitled to recover, although it appeared that the fare was paid by the plaintiff's master, with whom he was travelling at the time. That shows that there need be no contract. "It is said," says Jervis, C. J., "that, under the circumstances of this case, no action would lie by the plaintiff against these defendants, whatever the form of the declaration. But the admissions made in the course of the argument, and the authorities cited, place the defendants in a difficulty; for, it is conceded,—and indeed the concession could not have been avoided, that, if,—under the same

circumstances, the plaintiff had sustained the loss of a limb, or any other personal injury, he alone could have sued. It is said that that is because the master could not maintain an action in respect of the personal suffering of the servant, *though he might in respect of the loss of service*. But, upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any *contract* between him and the company, but by reason of a duty implied by law to carry him safely. If, under the circumstances of this case, the plaintiff could have recovered in respect of a personal injury sustained by him, there is no reason why he should not also recover in respect of the loss of his luggage. The breach of duty is the same in the one case as in the other." And Williams, J., says,—“The whole current of authorities, *beginning with *Govett v. Radnidge*, 3 East 62, [*226 and ending with *Pozzi v. Shipton*, 8 Ad. & E. 963 (E. C. L. R. vol. 85), 1 P. & D. 4, establishes that an action of this sort is, in substance, not an action of *contract*, but an action of *tort* against the company as carriers. That being so, the question is, whether it was necessary to allege any contract at all in the declaration. The earliest instance I find of an action of this sort is, in Fitzherbert's *Natura Brevium*, *Writ de Trespass sur le Case*, where it is said,—p. 94 D.,—‘If a smith prick my horse with a nail, &c., I shall have my action upon the case against him, without any warranty by the smith to do it well; for, it is the duty of every artificer to exercise his art rightly and truly as he ought.’ There is no allusion there to any contract. That being so, it seems to me to follow that the allegation of a contract in a case of this kind is altogether unnecessary.” In *Pippin and Wife v. Sheppard*, 11 Price 400, it was held that it is not a ground of demurrer to a declaration in an action on the case by a man and his wife against a surgeon, for an injury to the wife by reason of the defendant's improper and unskilful treatment, that it is not stated,—in the averment that the defendant was retained and employed as surgeon for reward to be to him paid,—*by whom* he was so retained, or *by whom* he was to be paid. In *Everard v. Hopkins*, 2 Bulstr. 332, it was held that an action upon the case lay against a surgeon for applying medicaments imperita to the plaintiff's servant, whereby he lost his services for a long time. In *Collett v. The London and North Western Railway Company*, 16 Q. B. 984 (E. C. L. R. vol. 71), an action was held to be maintainable by the plaintiff, an officer in charge of the mails, although the contract for the carriage of the mails was made with the post-master-general. “The allegation,” said Lord Campbell, “that it was the duty of the *company to use due and proper care and skill in conveying, is admitted. That duty does not arise in respect of [*227 any contract between the company and the persons conveyed by them, but is one which the law imposes: if they are bound to carry, they are bound to carry safely; it is not sufficient for them to bring merely the dead body to the end of the journey. They must exercise a reasonable care in performing the duty which is cast upon them by the act (1 & 2 Vict. c. 98); if the plaintiff has been injured through the want of such reasonable care, he has a right of action.” Patteson, J., says: “The plaintiff's right to sue arises, not from any particular contract with the defendants, but from their general duty to carry the mails and officers.” And Wightman, J., says: “It was clearly the duty of the

defendants to carry safely, as alleged: and that duty does not arise from any contract, but is cast upon them by stat. 1 & 2 Vict. c. 98." In *Gladwell v. Steggall*, 5 N. C. 733, 8 Scott 60, a declaration in case against a surgeon for negligence alleged that *the plaintiff* (who was an infant of twelve years), at the request of the defendant, *had employed the defendant* to bestow the care, &c., of him the defendant in the profession and business of a surgeon and apothecary, &c., and the defendant then accepted and entered upon such employment as such surgeon; and then proceeded to allege the duty resulting from such retainer: and it was held that it was immaterial *by whom* the defendant was retained, though a distinct issue was taken by the plea upon the retainer; and that, if the allegation of employment *by the plaintiff* was material, it was supported by proof that the plaintiff submitted to and received the defendant's attendance. [BYLES, J.—In all those cases there was a legal duty.] A railway company, like a loaded gun, is an instrument of great danger, requiring the exercise of the utmost skill and *circumspection. In *Dixon v. Bell*, 5 M. & *228] Selw. 198, the defendant was held responsible in case for incautiously leaving a loaded gun in a state capable of doing mischief. Here, *ex concessis*, there was negligence on the part of the defendants. [BYLES, J.—*Dixon v. Bell* is like *Langridge v. Levy*, 2 M. & W. 519; in error, *Levy v. Langridge*, 4 M. & W. 337.] The cases of *Collins v. The Bristol and Exeter Railway Company*, 1 Hurlst. & N. 517, *Mytton v. The Midland Railway Company*, 4 Hurlst. & N. 615, and *Coxon v. The Great Western Railway Company*, 5 Hurlst. & N. 274, are no authorities against the plaintiff here: the parties there chose to declare on the contract, when they might have relied on the duty. In *The Great Western Railway Company v. Blake*, 7 Hurlst. & N. 987, the plaintiff purchased a ticket at the Paddington station of the Great Western Railway Company, and paid one fare for his conveyance from thence to Milford in Pembrokeshire. The line of the Great Western Railway Company terminates a short distance beyond Gloucester, and the line from thence to Milford belongs to the South Wales Railway Company. By arrangement between the two companies the lines are worked and the fares paid by the passengers apportioned between them. The plaintiff was conveyed in the same carriage which he entered at Paddington towards Milford, and after the train had passed on to the line of the South Wales Railway Company, it came into collision with a locomotive engine left on that line by the servants of the South Wales Railway Company. There was no negligence on the part of the driver of the train. It was held in the Exchequer Chamber, that the Great Western Railway Company were responsible to the plaintiff, since, under the circumstances, there was an implied contract on their part that they would use reasonable care to *229] maintain *the whole line from Paddington to Milford in a condition fit for traffic. "Railway companies," says Cockburn, C. J., "ought at least to use due and reasonable care to keep the line over which they contract to carry passengers in a safe condition. There is no doubt that is the obligation which attaches to a railway company who undertake to convey passengers through the whole distance on their line; and if, by arrangement with another company, they convey passengers over the whole or part of another line, the same obliga-

tion attaches, and they make the other company their agent, and on their part they undertake that the other company shall keep their line in a proper condition." And Byles, J., expresses himself in similar terms: and he adds,—“Possibly the South Wales Railway Company might have been liable to the plaintiff below; yet here is a contract from which results a duty on the part of the Great Western Railway Company to take due care that the machinery from Paddington to Milford is safe and secure.” In the case of seduction, it is the invasion of the legal right of the father to the services of his daughter that gives him the right to maintain the action: see *Grinnell v. Wells*, 7 M. & G. 1033 (E. C. L. R. vol. 49), 8 Scott N. R. 741, 2 D. & L. 610; and see the cases collected in *Smith's Master and Servant*, 2d edit., 96 et seq. The defendant is guilty of no illegal act there, yet the master is entitled to an action: and, is it to be said that he is not entitled here, where the defendants have been guilty of a wrong? The action for seduction may be in case as well as in trespass: see *Robert Mary's Case*, 9 Co. Rep. 113 a; *Chamberlain v. Hazlewood*, 5 M. & W. 515. All the authorities show that the essential foundation of the action is, the public duty: *Williams v. Holland*, 10 Bingh. 112 (E. C. L. R. vol. 25), 3 M. & Scott 540 (E. C. L. R. vol. 30); *Com. Dig. Action upon the Case for Negligence* (B. 1), *where it is said that [*230 “the master may have an action for goods lost at an inn where his servant was a guest.” The result of all the authorities is this,—that, where a railway company allows a person to become a passenger on the railway, it becomes a common carrier and subject to all the responsibilities of a carrier according to the custom of the realm; and that there is a duty, independent of and collateral to the contract for remuneration, analogous to that of the surgeon, the smith, or the innkeeper. The defendants have failed to perform this duty in regard to a person with whom they have made a contract, and in so doing have invaded that in which the plaintiffs had a property, viz., the services of the person they engaged to carry. That the plaintiffs have lost the services of this person through their negligence is conceded. What answer can it be said that the defendants have entered into a contract with their servant?

Bovill, Q. C. (with whom were *O'Malley*, Q. C., and *Houston Brown*), contra.—This is confessedly a case of the first impression. The only authority at all in point is *Everard v. Hopkins*, 2 Bulstr. 332, and there the contract was with the plaintiff in the action. [ERLE, C. J.—That case was cited merely for the dicta of the judges.] If this action will lie, there was no necessity for Lord Campbell's Act, 10 Vict. c. 98. [ERLE, C. J.—Formerly, there could be no civil remedy until public justice had been satisfied by indicting the offender. That may be an answer to that argument.] The custom of the realm applies to carriers of goods only, not to carriers of passengers. The duty to carry safely is one which arises out of the contract, whether express or implied from the relation of the parties. To whom do the defendants owe a duty here? Clearly to the person with whom they contracted. Suppose *an anchor or a cable to give way through [*231 a defect in the welding, are the sailors or the passengers to have actions against the anchor-smith or the chain-maker for compensation for damage resulting to them from the loss of the ship? In

Langridge v. Levy, 2 M. & W. 519, the action was held to be maintainable by the son, on the ground of the false representation or warranty. The court there expressly repudiate the ground upon which the plaintiffs rely here. "We are not prepared," says Parke, B., "to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that, wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrongdoer. We think this action may be supported without laying down a principle which would lead to that indefinite extent of liability so strongly put in the course of the argument on the part of the defendant; and we should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of *any person* whosoever into whose hands they might happen to pass, and who should be injured thereby." Lord Denman, in delivering the judgment of the court of error,—Levy v. Langridge, 4 M. & W. 339, says: "We agree with the Court of Exchequer, and affirm the judgment on the ground stated by Parke, B., 'that, as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.'" In Winterbottom v. Wright, 10 M. & W. 109, A. contracted with the

*232] postmaster-general to provide *a mail-coach to convey the mail-bags along a certain line of road; and B. and others also contracted to horse the coach along the same line. B. and his co-contractors hired C. to drive the coach: and it was held that C. could not maintain an action against A. for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction. Lord Abinger there said: "This is an action of the first impression, and it has been brought in spite of the precautions which were taken in the judgment of this court in the case of Levy v. Langridge, to obviate any notion that such an action could be maintained. We ought not to attempt to extend the principle of that decision, which, although it has been cited in support of this action, wholly fails as an authority in its favour; for, there the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting. Here, the action is brought simply because the defendant was a contractor with a third person; and it is contended that thereupon he became liable to everybody who might use the carriage. If there had been any ground for such an action, there certainly would have been some precedent of it: but with the exception of actions against innkeepers, and some few other persons, no case of a similar nature has occurred in practice. That is a strong circumstance, and is of itself a great authority against its maintenance. It is, however, contended, that this contract being made on the behalf of the public by the postmaster-general, no action could be maintained against him, and therefore the plaintiff must have a remedy against the defendant. But that is by no means a necessary consequence: he may be remediless altogether. *There is no privity of contract between these parties*: and, if the plaintiff can

*sue, every passenger, or even any person passing along the road who was injured by the upsetting of the coach, might bring [*233 a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." Alderson, B., said: "The only safe rule is, to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty." And Rolfe, B., says: "The breach of the defendant's duty stated in this declaration, is, his omission to keep the carriage in a safe condition: and, when we examine the mode in which that duty is alleged to have arisen, we find a statement that the defendant took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach, and, during all the time aforesaid, it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition. The duty, therefore, is shown to have arisen solely from the contract: and the fallacy consists in the use of that word 'duty.' If a duty to the postmaster-general be meant, that is true: but, if a duty to the plaintiff be intended (and in that sense the word is evidently used), there was none." The company here do not enter into two contracts, one with the master, the other with the servant. In *Tollit v. Sherstone*, 5 M. & W. 283, a declaration in case stated that one Young delivered to the defendant, a livery-stable keeper, a horse of the plaintiff, to be kept by him for Young, and to be delivered upon the request of Young, on satisfaction of the defendant's demands; and it *thereupon became and was the duty of the defendant, on [*234 being paid his demand in respect of the horse, to redeliver it on the request of Young: averment, that Young requested the defendant to deliver the horse to the plaintiff, and the plaintiff then paid the defendant all his demands in respect of the horse; yet the defendant did not, when so requested, deliver the horse to the plaintiff, but wrongfully kept and detained him, whereby the plaintiff lost the profit arising from the possession and employment of the horse. On motion in arrest of judgment, it was held that the count was bad, as not showing any duty in the defendant to redeliver the horse to the plaintiff; and that it could not be supported as an informal count in trover, the detention under such circumstances not amounting to a conversion. "As the declaration," says Lord Abinger, "recognises such an interest in Young as enabled him to make a lawful contract with the defendant, and there is nothing to show the determination of that interest, we must take the wrong to be done to Young, and not to the plaintiff. Then, if the count be not maintainable as a count in trover, is it so on the ground of a duty resulting to the plaintiff? In the cases cited by Mr. Thesiger, the persons claiming were parties to the original contract: but here the only contract of the defendants was with Young, and the order by him was, for aught that appears, to deliver to the plaintiff as his agent, and the detention was from him: there is, therefore, no breach of duty to anybody but Young." So, here, the only contract of the defendants was with Baxter. They

could owe no duty to the plaintiffs, who were strangers. Maule, J., says: "It is clear that an action of contract cannot be maintained by a person who is not a party to the contract: and *the same principle extends to an action of tort arising out of contract.*" [The Court called upon

*235] *Keane, Q. C., to reply.—If it were the mere contract which gave the right of action, the liability of the company to the master would depend upon whether or not the contract for the conveyance of the servant was made by him. The defendants cannot, however, get rid of their public duty as carriers. It is clear from the judgment of Lord Ellenborough in *Ansell v. Waterhouse*, 6 M. & W. 385, and of Dallas, C. J., in *Bretherton v. Wood*, 6 J. B. Moore 141 (E. C. L. R. vol. 17), 9 Price 408, 8 Brod. & B. 54, that this did not rest in contract. (a) Mr. Justice Cowen, in a case of *Cole v. Goodwin*, 19 Wendell (American) 251, lays it down that, although ordinary bailees may make their own terms with their customers, it is not so with common carriers and innkeepers; and that they, from their public employment, owe duties, at common law, from which public policy demands that they should not be discharged, and consequently that they cannot limit their common-law liability even by express agreement. [WILLES, J.—In *Johnson v. The Midland Railway Company*, 4 Exch. 367, it was held that a railway company is not bound to carry every description of goods, and between all places on their line, but only such goods, and to and from such places, as they have publicly professed to do, and have convenience for that purpose. (b) There was a long series of cases in which the liability of railway companies was qualified by contract, and which resulted in the passing of the Railway Traffic Act, 17 & 18 Vict. c. 31.] *Tollit v. Sherstone*, 5 M. & W. 283, and *Winterbottom v. Wright*, 10 M. & W. 109, have no application. But the judgments of Jervis, C. J., and of Williams, J., in *Marshall v. The York, Newcastle, and Berwick Railway Company*, 11 C. B. 655 (E. C. L. R. vol. 73), are precisely in point. If *236] there was no duty here, there could *have been none in *Martinez v. Gerber*, 3 M. & G. 88 (E. C. L. R. vol. 42), 3 Scott N. R. 386.

ERLE, C. J.—This was an action by Messrs. Alton & Co. against the Midland Railway Company, charging them with negligence in carrying by their railway from Trent to Nottingham one Baxter, the servant and traveller of the plaintiffs, whereby the servant was injured, and by reason thereof the plaintiffs lost the benefit of his services. Upon the face of the declaration it appears that the relation between the defendants and Baxter arose out of contract; for, the declaration alleges that they were to carry him "for hire and reward to the defendants in that behalf." It is the demurrer to the declaration which raises the point upon which my judgment turns: but it is made still more clear by reference to the plea, by which the defendants allege that they contracted with Baxter to carry him as such passenger as in the declaration mentioned on the said journey, and that they received him as in the declaration mentioned under and by virtue of

(a) See *Ross v. Hill*, 2 C. B. 877 (E. C. L. R. vol. 52). And see *Oxlade and The North Eastern Railway Company*, 15 C. B. N. S. 680 (E. C. L. R. vol. 109).

that contract, and that they did not contract with the plaintiffs to carry him, and that the matter complained of in the declaration was not a breach of any contract between the defendants and the plaintiffs, but was a breach of the said contract between the defendants and Baxter. The demurrer to that plea admits that the relation between the defendants and Baxter was created by contract. The plaintiffs, therefore, are seeking to recover consequential damages by reason of the breach of a contract between the defendants and a third person. I take the law to be clear, that, where a servant is injured by matter *ex delicto*, and his master in consequence loses the benefit of his services, the master may have an action against the wrongdoer for that consequential damage. The distinction upon *which I rely, [*237 is, that, in all the cases where the master has recovered damages in such an action, the injury has been occasioned to the servant by the tortious act of the defendant: I find none where the damage has arisen by means of the breach of a contract. I do not go into the origin of the master's right to sue for a wrong done to his servant, or inquire whether, as Mr. Smith puts it (*Master and Servant* 86), it may have originated at a time when the master claimed a property in the services of his servant. I take the law as I find it: and I find no case where an action has been sustained by the master for consequential damage for an injury done to his servant, where that injury arose from the breach of a contract between the servant and the defendant. *Hall v. Hollander*, 4 B. & C. 660 (E. C. L. R. vol. 10), 7 D. & R. 133, *Martinez v. Gerber*, 3 M. & G. 88 (E. C. L. R. vol. 40), 3 Scott N. R. 386, and *Gough v. Brian*, 2 M. & W. 770, were all cases of direct wrongs done to the servant. In *Hodsoll v. Stallebrass*, 11 Ad. & E. 301 (E. C. L. R. vol. 39), 3 P. & D. 200, 8 Dowl. P. C. 482, the master recovered for an injury to the hand of his apprentice, whereby loss of service accrued,—the damage alone not being the cause of action, but the illegal act and the damage together. So, in *Gilbert v. Schwenck*, 14 M. & W. 488, the defendant had forcibly taken the child out of the custody of the plaintiff. All these were cases of clear wrongs. Here, however, the action is founded upon a contract entered into between the company and Baxter. I am well aware that there are many cases in which a plaintiff may at his option seek redress either by declaring *ex contractu* or *ex delicto*, and that there are certain advantages, which are incidental to the form of procedure, to be obtained from adopting the latter form. But, where it is necessary to resort to the substance of the cause of action, the distinction between the two has been constantly maintained. *See the [*238 notes to *Cabell v. Vaughan*, 1 Wms. Saund. 191 *d*, where it is laid down that the defendant does not lose his plea in abatement by being sued in tort in respect of a matter which is founded on contract. "The same rule applies," says the learned editor, "where the action is founded upon a matter *ex quasi contractu*: and therefore, if an action be brought against one only of several persons upon a matter founded in contract, though the form of the action be *case* for malfeasance or nonfeasance, and the plea *not guilty*, yet the defendant must plead it in abatement: *Boson v. Sandford*, Carth. 62, 63: *Buddle v. Wilson*, 6 T. R. 369." And at p. 291 *f*, he says: "From all the cases,

and especially that last cited,^(a) the principle appears to be this, that, where the action is maintainable for the *tort* simply, without reference to any contract made between the parties, no advantage can be taken of the omission of some defendants, or of the joinder of too many, as, for instance, in actions against carriers, which are grounded on the custom of the realm: *Ansell v. Waterhouse*, 6 M. & Selw. 385. But, where the action is not maintainable without referring to a contract between the parties, and laying a previous ground for it by showing such contract, there, although the plaintiff shapes his case in tort, he shall yet be liable to a plea in abatement if he omit any defendant, or to a nonsuit if he join too many; for, he shall not, by adopting a particular form of action, alter the situation of the defendant. On this last ground undoubtedly the case of *Green v. Greenbank*, 2 Marsh. 485 (E. C. L. R. vol. 4), was determined, in which it was held that infancy was a good plea to an action on the case on a warranty."^(b)

*239] The substance is looked to, and not the *mere form. So, in Rolle's Abridgment, *Action sur Case* (D), pl. 3, it is said,—“Si un hostery vient al un infant, et il ceo conserve, et ses guests sont robb, uncore nul action gist vers l'infant:” *Crosse and Androe's Case*. That being the general line of authority, I think there is very great weight in the observations of the learned judges in *Langridge v. Levy*, 2 M. & W. 519, *Levy v. Langridge*, 4 M. & W. 337, and *Winterbottom v. Wright*, 10 M. & W. 109, as to the inconvenience of laying down a principle which would lead to an indefinite extent of liability. The liabilities of parties by reason of their contracts can be foreseen. As a general rule, they are under their own control. The liabilities arising out of them are bounded by the considerations affecting the two contracting parties. Upon that general view I found my opinion that for the consequential damages claimed on the present occasion the plaintiffs cannot sue. The cases as to costs rest upon the law of procedure. Here, the liability of the defendants, if any, arises out of contract: and there is no contract between these parties.

WILLES, J.—I am of the same opinion. It must be admitted by the defendants that a long series of authorities has established that a master may sue for loss of services caused by a pure wrong, a trespass, to his servant, as, by beating him. On the other hand, it is indisputable that no such action has ever been sustained in a case in which the injury to the servant was not actionable in respect of the civil wrong, but only in respect of a duty arising out of and founded upon a contract with the servant. The liability of the defendants in the *240] case before us is of the latter kind, and *falls within the principle of a series of decisions upon which there is no room for doubt. The case does not, I apprehend, fall within the principle contended for on the part of the plaintiffs, for this simple reason, because the rights founded on contract belong to the person who has stipulated for them. Here, the right to be carried safely was stipulated for by the servant: it was a right acquired by him by reason of

(a) *Bretherton v. Wood*, 3 Brod. & B. 54 (E. C. L. R. vol. 7), 6 J. B. Moore 141 (E. C. L. R. vol. 17), 9 Price 408.

(b) The nature and extent of the liability of an infant or a married woman cannot be changed by suing *ex delicto* in respect of a claim arising on contract. Per Byles, J., in *Burnard, app., Haggis, resp.*, 14 C. B. N. S. 45 (E. C. L. R. vol. 108).

a bargain with the defendants. To hold that the plaintiffs can maintain this action would be to hold that they could acquire a right by means of a contract to which they were no parties, either by themselves or by their agent. It has been strongly, but I think erroneously, urged that the cause of action here is founded on a wrong. The law does not so deal with it: it gives the right to sue in form either in tort or in contract, at the party's election. That puts in a strong light the objection to which I have referred, because the election to sue in tort or in contract is given to the servant. The servant may bring an action against the company founded on the contract, and may so determine the election. If the master might sue, he might elect to treat it as a tort, and so to determine the election otherwise than the person who entered into the contract has determined it. That to my mind reduces the argument for the plaintiffs to an absurdity. Election, it must be admitted, is purely technical, and was intended to give the party a more convenient and compendious remedy. If traced to its origin, there would be found many instances to prove that. I may mention a few of them. First, I will start with the doctrine of implied promises, because, whether the law raises a duty or implies a promise which the parties did not stipulate for, is all one. Take the case of a contract with various stipulations, as in a building contract; and take it that the contract is only partly completed, without any *default on the part of the builder. Certain of the work has been done, and certain materials supplied: the law [*241 gives the builder his election to declare upon the special contract, or he may say that he has done the work and supplied the materials, and that the defendant promised to pay him the value on request. That was the state of the law when the case of *Bretherton v. Wood*, 6 J. B. Moore 141 (E. C. L. R. vol. 17), 9 Price 408, 3 Brod. & B. 54 (E. C. L. R. vol. 7), and the other cases relied on, were decided. But no one would contend that the change in the mode of declaring would affect the legal rights of the parties. That is one instance where an election is given in the mode of procedure. I might travel through an infinite series of legal fictions. Take the case of a man selling the goods of another without his authority. The law allows the party whose goods are so sold to declare in an action for the wrongful conversion, or at his election to sue on the implied promise to pay over the proceeds to him, though in truth there was no such promise. These are cases in which the law has invented fictions to give a more convenient remedy to the party wronged. In the last case, you have an instance of an election which is clogged in this way,—if the plaintiff chooses to bring an action for money had and received, he subjects himself to all the consequences of the defendant's being let in to plead a set-off, infancy, and the like. I now come to the case before us. This is a case in which there could have been no duty but for the contract to carry safely in consideration of a certain payment. The passenger purchases the duty which the law says arises out of the contract: and he has his election to sue upon the contract, or for the breach of the duty founded on the contract. I will cite one authority for the purpose of illustrating this part of my judgment. I asked in the course of the argument if the executor could sue upon *such a con- [*242 tract as this; and Mr. Keane said he thought not. I am dis-

posed to think the answer given right: it is probably like a promise of marriage, which, not being within the statute of E. 4, *moritur cum persona*. But, suppose the personal estate of the servant sustained injury through the defendant's breach of duty, as, if he had taken a quantity of luggage with him, which had been lost or damaged, it is clear his executor might have sued for that damage. For this I find an authority in 1 Williams on Executors, 5th edit. 712, where it is said: "It must be observed, that, if the executor can show that damage has accrued to the personal estate of the testator by the breach of an express or implied promise, he may well sustain an action at common law to recover such damage, although the action is in some sort founded on a tort. Thus, in *Knights v. Quarles*, 2 Brod. & B. 102 (E. C. L. R. vol. 6), 4 J. B. Moore 532 (E. C. L. R. vol. 16), where an administrator declared in *assumpsit* against an attorney for negligence in investigating a title about to be conveyed to the intestate, and the declaration went on to allege special damage to the personal estate; the defendant demurred; and it was urged on his behalf that the action, though in form *ex contractu*, was in substance *ex delicto*, the breach of promise complained of being no more than a tort arising out of a neglect of duty: but the court were of opinion that there was no ground for the demurrer, an express promise being alleged, a breach of it in the lifetime of the intestate, and an injury to his personal property, the truth of which allegations was admitted by the demurrer; that it made no difference in this case whether the promise was express or implied, the whole transaction resting on a contract; that, though perhaps the intestate might have brought case or *assumpsit* at his election, *assumpsit* being the only remedy for the administrator, it was very necessary the action

*243] should be maintained, or the defendant might escape out of the consequences of his misconduct, and the intestate's estate suffer an irreparable injury. It was further observed, that, if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured,—though it was clear he, in his lifetime, might, at his election, sue the coach proprietor in contract or in tort, it could not be doubted that his executor might sue in *assumpsit* for the consequences of the coach proprietor's breach of contract." The action was there held to be sustainable at common law because the substance of the matter was contract. I have only one other remark to make. This was a contract for the reasonably safe carriage of the party contracted with. I say *reasonably* safe, because there is a wide difference between the liability of a carrier of goods and that of a carrier of passengers, though I do not found my judgment on this distinction. This is an action founded on a contract, and brought by persons who are no parties to the contract. There is no authority for the maintenance of such an action, and I cannot consent to be a party to its introduction.

BYLES, J.—I am of the same opinion. After the very elaborate explanation by my Lord and my Brother Willes of the principle upon which actions of this sort rest, with which I entirely agree, I will only make one or two observations. It is plain upon the declaration

and on the plea, that there was no contract, express or implied, between the plaintiffs and the defendants, but that the only contract was between Baxter and the defendants. In most cases of this nature, no doubt, the plaintiff has his election to sue either upon the contract or for the tort: but, by *changing the form of action, the right to sue [*244 cannot be extended to a stranger. It would lead to alarming consequences if it could. No man can sue for a breach of duty, unless for a breach of a duty to himself. That was decided in *Winterbottom v. Wright*, 10 M. & W. 109. A precedent in 8 *Wentworth's Pleading* 397, was there cited, of a declaration in an action against an attorney who had received instructions to make a will for one A. B., whereby a certain estate was to have been devised to the plaintiff, for neglecting to prepare it in time, whereby the said A. B. died intestate, and so the plaintiff lost the estate. That has always been considered a bad precedent.^(a) The attorney owed no duty to the proposed legatee. If she could have maintained an action, on the same principle her heir or executor would have had the same right. So, in the case of the insufficient anchor, put by Mr. Bovill,—the anchor-smith would be liable to the shipowner, but not to a passenger who sustained loss in consequence. Suppose the case of a servant employing a surgeon to perform an operation, and sustaining an injury from the surgical-instrument maker having furnished the surgeon with an improper instrument,—would an action lie against the instrument-maker either at the suit of the servant or of his master? And yet the argument on the part of the plaintiffs must go to that length, if the law be as they contend it is. If we depart from the rule stated by my Lord and my Brother Willes, we open a way to a most inconvenient and dangerous extension of responsibility. Thus stands the case upon principle. How is it with reference to the authorities? Mr. Keane recited a case of *Everard v. Hopkins*, 2 Bulstr. 332. But, upon investigating the facts, it will be found that there the contract was *made with the master. That case, therefore, is no authority, [*245 as far as the decision goes: and the dicta of the learned judges must repose very much on the accuracy of the reporter. No other case bearing directly upon the matter was referred to by the plaintiffs' counsel: and *Winterbottom v. Wright*, 10 M. & W. 109, and *Langridge v. Levy*, 2 M. & W. 519, and *Levy v. Langridge*, 4 M. & W. 337, are authorities the other way. I do not think a more important question than this has come before the court for many years: and I think it is our duty not to intimate the slightest doubt upon it.

MONTAGUE SMITH, J.—As I was not present during the whole of the argument, and the matter has been so fully gone into by my Lord and my two learned Brothers, I will only say, that, so far as I have been able to acquaint myself with the matter, I entirely assent to their judgment. Mr. Keane contends that the action is maintainable in respect of the public duty, which he says is collateral and parallel to the contract. But I think the whole substratum of his argument is unsound. There is no duty independent of contract: the whole foundation of it is the contract. And the only persons who can sue

(a) It bears the signature of Vitruvius Lawes; but Mr. Lawes is said to have discouraged the action.

for the breach of a contract, or for the breach of any duty arising out of the contract, are, the stipulating parties.

Judgment for the defendants.

In the recent case of *Stetler v. Fairmount Passenger Railway Company*, not yet reported, the Supreme Court of Pennsylvania followed the ruling in *Alton v. Railway Company*, and decided that a mother could not sue for an injury to her minor son, where the boy himself had bought and paid for his ticket. The only ground upon which such an action could be put is that relied upon in the principal case, viz.: that the negligence of the carrier is a breach of duty rather than a breach of contract, because it is a breach of duty, even where there has been no contract, as in the case of a passenger carried as an invited guest: *Railroad Co. v. Derby*, 14 Howard (1852) 468. But there the duty to carry safely is owing only to the party reposing the confidence, and is imposed by the law solely because such confidence has been given. In every case of employment the common law superadds a duty to perform the service faithfully. A manufacturer impliedly warrants his products to be fit for the use for which they are intended: *Jones v. Bright*, 5 Bingham 533 (E. C. L. R. vol. 15), and a keeper of a livery-stable is under a duty to furnish safe vehicles: *Hadley v. Cross*, 34 Vermont (5 Shaw 1861) 586; but neither the manufacturer nor the owner of the coach would be liable to a passenger injured by its breaking down: *Winterbottom v. Wright*, 10 M. & W. 109. So in *Boorman v. Brown*, 3 Queen's Bench 511 (E. C. L. R. vol. 43), a broker was held liable for a breach of duty; but in *Howard v. Shepherd*, 9 C. B. 297 (E. C. L. R. vol. 67), the endorsee of a bill of lading was not allowed to

sue the carrier of goods, though the duty to carry goods safely is founded on the custom of the realm, and involves a liability greater than that resting on the carrier of passengers: *Ingalls v. Bills*, 9 Metcalf (Mass. 1845) 1.

An apparent exception to the general rule that "where a tort arises out of a contract, only a party to the contract can sue," *Tollit v. Shenstone*, 5 M. & N. 283, *Livingston v. Cox*, 6 Barr 362, is found in such cases as *Langridge v. Levy*, *ut supra*; *Farrant v. Barnes*, 103 E. C. L. R. 553; *Godley v. Hagerty*, 8 Harris (Pa. 1853) 387; *Carson v. Godley*, 2 Casey (Pa. 1856) 111; but they must rest upon the ground that one who is guilty of wilful fraud, or who maintains a nuisance, is supposed to intend all the consequences of his wrongful act, and any one injured thereby can have his action. And, therefore, in the case of *Loughmere v. Halliday*, 6 Exchequer 761, the defendant, who had warranted a patent lamp to the husband, was held not liable to the husband *and wife*, in an action brought for injuries to her, in the absence of wilful fraud. This ruling is in close analogy to that which forbids the attempt to get over the incapacity of a party to a contract—as an infant or a married woman—by substituting an action for the tort—the principle being well settled that "though the action may be in form as for a tort, yet if the subject of it be based on contract, the suit will be attended by all the incidents of an action *ex contractu*:" *Wright v. Leonard*, 103 E. C. L. R. 238, American note.

***JEFFRYES v. EVANS. June 5.**

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1. A reservation in a lease, of the right of "shooting and sporting" over the land demised, is not limited to "game," strictly so called, but reserves to the lessor the exclusive right to follow and shoot such animals as are in common parlance understood to be the subject of sport.

2. In 1857, A. demised to B. a farm called Upton Farm, containing 264 acres, about 40 of which consisted of timber and underwood, with furze-covers in various other parts of the farm. This lease reserved to the lessor "all timber and other trees, mines, minerals, and quarries on the said farm," and also "*the exclusive right of shooting, fishing, and sporting on the said farm,*" with liberty to the lessor, his servants, &c., and others by his authority, at all seasonable times to enter for any of the purposes contained in the reservations therein contained.

In 1860, A. demised Upton Castle and about 60 acres of land adjoining it to C., and also "the exclusive right of shooting and sporting over and taking the game, rabbits, and wild-fowl upon the said premises and also upon the entire manor of Upton," including the 260 acres under lease to B,—reserving to the lessor "all trees, underwood, thorns, and bushes growing on the land, as well as all mines, minerals, and quarries," &c.; with a covenant for quiet enjoyment, without interruption by the lessor or any person or persons lawfully claiming by, from, or under him, &c.

B., finding the rabbits too numerous, by means of ferrets and guns destroyed a large number of them: he also cut all the underwood on his farm, and grubbed up and destroyed the furze-covers, and thereby materially interrupted and injured C.'s right of sporting:—

Held, that, inasmuch as these acts on the part of B. were not warranted by the terms of the demise to him, they did not constitute a breach of A.'s covenant for quiet enjoyment in the lease of 1860.

THIS was an action in which the plaintiff sought to recover damages for, amongst other things, the breach of certain covenants contained in a lease granted to him on the 25th of September, 1860, by the defendant and one R. D. J. Evans, as trustees of Charles Tasker Evans, an infant.

The declaration stated, that theretofore, by an indenture made between the defendant and Richard Davis Jones Evans, since deceased, of the one part, and the plaintiff of the other part, the defendant and the said R. D. J. Evans demised to the plaintiff a certain messuage or dwelling-house and lands therein described, for a term of seven years, which is not yet expired, *and also the exclusive right at all times during the said term of shooting and sporting over and taking the game, rabbits, and wild-fowl upon the said premises and upon certain other manors and lands in the said indenture mentioned*, excepting and reserving to the defendant and the said R. D. J. Evans, their heirs and assigns, all timber and other trees, underwood, thorns, and bushes growing or to grow on the said premises, with liberty of entering upon any part of the said demised lands and premises, and doing all necessary and convenient acts for the preserving, pruning, felling, and carrying away the said timber and other trees, underwood, thorns, and bushes, making reasonable compensation for all consequential damages or loss to the plaintiff; he the said plaintiff yielding and paying to the defendant and the said R. D. J. Evans a certain rent in that behalf: that the defendant and the said R. D. J. Evans did thereby covenant with the plaintiff, amongst other things, that he should peaceably and quietly possess and enjoy the said premises so to him thereby demised and granted as aforesaid, for and during the said term, without any interruption by them the defendant and the said R. D. J. Evans or either of them, or any person or persons whomsoever lawfully claiming by, from, or under him, them, or any of them; and also that the defendant and the said R. D. J. Evans should and would at all times

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during the said term well and substantially repair and keep in repair the roofs, walls, and window frames of the said dwelling-house and offices belonging thereto: that thereupon the plaintiff entered into the said demised premises, with the appurtenances, and became and was possessed thereof for the said term, and the plaintiff had always done and been ready and willing to do everything on his part, and everything had happened, and all times had elapsed, to entitle him to the full benefit of the said covenant, and to maintain this action: Yet, that, after the making of the said indenture, and during the said term, one John Rees, then lawfully claiming the right to shoot the rabbits in and upon the said manors and lands through and under the defendant and the said R. D. J. Evans, and having a good title to the same through and under them, entered into and upon the same lands, and *248] shot and killed and carried away large quantities of rabbits *there, and evicted the plaintiff from the enjoyment of the said exclusive right of shooting and sporting and taking the said rabbits, so to him demised and granted as aforesaid: That the said John Rees, then also lawfully claiming and in fact having through and under the defendant and the said R. D. J. Evans the right to cut down divers furze-covers, woods, and plantations in and upon the said manors and lands over which the plaintiff had under and by virtue of the said indenture the exclusive right of shooting and sporting as aforesaid, cut down and carried away and destroyed divers quantities of the said furze-covers and plantations, and thereby evicted the plaintiff from and disturbed him in the enjoyment of the said right of shooting and sporting in and over the said manor and lands: That, during the said term, the defendant and the said R. D. J. Evans in his lifetime, and the defendant since the death of the said R. D. J. Evans, entered upon certain of the said lands and premises thereby demised, for the purpose of preserving, pruning, felling, and carrying away the timber, underwood, trees, thorns, and bushes then and there growing, and in so doing caused damage, loss, and injury to the plaintiff, by destroying the hedges, and subverting the soil, and destroying the grass and herbage, and prostrating the fences and gates, and breaking and leaving open divers gates and fences in and upon the said demised lands and premises, and thereby letting loose and injuring divers horses, cattle, and other animals belonging to the plaintiff, yet the defendant and the said R. D. J. Evans did not, nor did the defendant since the death of the said R. D. J. Evans, although required by the plaintiff so to do, make any compensation whatsoever to the plaintiff for the said damage, loss, or injury so sustained by him as aforesaid, contrary to the said covenant in that behalf: And that the defendant *249] and *the said R. D. J. Evans had not in the lifetime of the said R. D. J. Evans, nor had the defendant since his death, well or substantially or in any way repaired and kept in repair during the said term the roofs, walls, and window-frames of the said dwelling-house and offices belonging thereto, or any of them, although since the commencement of the said term hitherto the said roof, walls, and window-frames had been out of repair, and had required repair, of which the defendant and the said R. D. J. Evans respectively had always had notice: And that by reason thereof the plaintiff had

incurred divers expenses and discomfort, and the walls and other parts of the said dwelling-house had been much injured: Claim, 300*l*.

The defendant pleaded,—first, as to the first breach, that the said John Rees did not enter into the said lands and shoot and kill the said rabbits there, and evict the plaintiff from the enjoyment of the said exclusive right of shooting and sporting and taking the said rabbits, as alleged,—secondly, to the first breach, that the said John Rees did not lawfully claim the right nor had he a good title to shoot the said rabbits in and upon the said manors and lands through and under the defendant and the said R. D. J. Evans, as alleged,—thirdly, to the second breach, that the said John Rees did not cut down, carry away, and destroy the said furze-covers and plantations, and thereby evict the plaintiff from and disturb him in the enjoyment of the said right, as alleged,—fourthly, to the second breach, that the said John Rees had not through and under the defendant and the said R. D. J. Evans the right to cut down the said furze-coverts, woods, and plantations, as alleged,—fifthly, to the third breach, payment into court of 7*l*. 15*s*.,—sixthly, to the fourth breach, that he the defendant and the said R. D. J. Evans had, and the defendant had, well *and [*250 substantially repaired and kept in repair during the said term the roofs, walls, and window-frames of the said dwelling-house and offices belonging thereto.

The plaintiff joined and took issue respectively on all the pleas except the fifth; and as to that plea replied that the sum paid into court was not sufficient to satisfy his claim in respect of the matter therein pleaded to.

The cause was tried before Blackburn, J., at the last Spring Assizes at Haverfordwest, when the facts which appeared in evidence were as follows:—By indenture of lease of the 24th December, 1857, the defendant and R. D. J. Evans, as trustees under the will of the Rev. W. P. Evans, deceased, demised to one John Rees, his executors, &c., for nine years from the 29th of September then last, All that messuage or farm-house, farm, and lands, called Upton Farm, in the parish of Upton, in the county of Pembroke, together with all buildings, yards, gardens, orchards, ways, watercourses, rights of common, and other rights, members, and appurtenances whatsoever to the said farm belonging, “except and always reserved unto the said lessors and the survivor of them, his executors and administrators, and other the trustees or trustee for the time being of the said will, and also unto the person or persons who shall for the time being be entitled to the said premises in reversion expectant on this demise (all of whom are hereinafter designated as the lessors or lessor), all timber and other trees, mines, minerals, and quarries on the said farm, with free liberty of ingress, egress, and regress to fell, cut, and work the same respectively, and to cart and carry away the timber and the produce of the said mines and quarries; and also except and reserved unto the lessors or lessor *the exclusive right of shooting, fishing, and sporting on the said farm.*” The lease also provided that “it should be lawful for the *lessors or lessor, and their or his agents, surveyors, ser- [*251 vants, or others by their or his authority, at all seasonable times during this demise to enter into and upon the said demised premises for any of the purposes mentioned in the reservations here-

inbefore contained, or for the purpose of viewing and examining the state and condition thereof," &c. There was also a covenant that the lessee, his executors, &c., would "at all times during the demise use, cultivate, manure, and manage all the lands thereby demised in a good and husband-like manner, according to the most approved system of husbandry in the neighbourhood, and would at the expiration or other sooner determination of the said term leave the same in good plight and condition;" and also would not "do or suffer to be done any waste, injury, or spoil whatsoever to the hereby demised premises, or any part thereof;" and also would not "at any time during the demise hunt, shoot, fish, or sport in or upon any part of the hereby demised premises, nor permit any other person or persons so to do, except the lessors or lessor and those authorized by them or him." There was also the usual proviso for re-entry for breach of any of the covenants.

On the 25th of September, 1860, the defendant and R. D. J. Evans granted to the plaintiff a lease of "all that messuage, tenement, and lands, with the appurtenances thereto belonging, called Upton Castle," for seven years from the 25th of March, 1859, at the yearly rent of 125*l*. By this lease the exclusive right of fishing and sporting over and taking the game, rabbits, and wild fowl, not only upon the land occupied with Upton Castle (about 60 acres), but upon the entire manor of Upton (which would include the land in the occupation of Rees, about 264 acres), was granted to the plaintiff. The lease also contained a reservation of all trees, underwood, thorns, and bushes *252] growing on the land, as well as all mines, minerals, and quarries of every description, with liberty to enter upon the land and do all necessary or convenient acts for the preserving, pruning, felling, winning, converting, and carrying away the said reserved things, making reasonable compensation for all consequential damages or loss; and also liberty to plant and transplant trees, and to sow the seeds of trees in the hedge-rows and wastes, and to fence the same. The lessee covenanted, amongst other things, to pay the rent, rates, and taxes, and to repair, excepting the roofs, walls, and window-frames, and to leave the premises in repair, except, &c. And the lessees covenanted for quiet enjoyment, and that the roofs, walls, and window-frames should be repaired and kept in repair by them.

It appeared that Rees's farm adjoined the sixty acres let to the plaintiff, from which it was separated by a belt of timber and underwood (brambles, holly, and brushwood), from 50 to 70 yards broad, and about a mile and a quarter long, on Rees's land; that, in several of the fields demised to Rees were furze-covers which at the commencement of the plaintiff's term were well stocked with hares, rabbits, partridges, and grouse; and that, shortly after the plaintiff's tenancy commenced, Rees cut all the underwood and grubbed up the furze-covers, thus driving away the game, so as almost entirely to destroy the shooting; and also by himself and his servants shot and destroyed by means of ferrets a large number of rabbits.

Complaints being made to the defendant of these acts on the part of Rees, the defendant wrote to him on the 16th of February, 1861, upon the subject: and in reply thereto Rees wrote,—“It is quite true that I have occasionally shot a rabbit, and so have my sons, but not

as a matter of sport, but for the purpose of destroying them. Rabbits are injurious and destructive animals; and they have so increased upon my farm of *late they are become intolerable. I there- [*253 fore do not think that I infringe upon any covenant in my lease by killing them, any more than I should in shooting rooks or wood-pigeons, when destroying my crops. It is also true I have employed men to ferret the rabbits, and am also continuing to grub the furze, which I shall continue to do until they cease to be injurious to me, so long as I do not injure your estate, but on the contrary improve it."

It was also proved that the defendant, in 1863, entered upon a portion of the land demised to the plaintiff, for the purpose of felling timber and stacking the bark, and that the grass, which had been laid down for hay, was in consequence much trodden down and spoiled, and the fences broken; and, further, that, in consequence of the defendant's workmen leaving open a gate which separated a field where some young horses were kept from another field in which were four ponies belonging to the defendant, they got mingled, and one of the ponies received a kick which damaged it to the extent according to the plaintiff's estimate of about 5*l*.

Evidence was also given that the roofs, walls, and window-frames of the messuage demised to the plaintiff were suffered to be out of repair to such an extent as to render some of the rooms wholly untenable.

On the part of the defendant it was contended that a reservation of "hunting, shooting, fishing, and sporting" does not include rabbits, inasmuch as they are not properly speaking game; that Rees was justified in cutting the underwood and grubbing up the furze, for the better cultivation of the farm, and in shooting and destroying the rabbits, for the protection of his crops; that enough had been paid into court to cover the damages claimed on the third breach, and that the injury to the pony was too remote; and that also the evidence did not sustain the fourth breach.

*The learned judge left it to the jury to say,—first, what [*254 damages the plaintiff was entitled to recover for the destruction of the rabbits; reserving for the court the question whether it was done by lawful title.

Secondly, whether Rees injured the plaintiff's right of sporting by cutting and destroying the underwood and furze, and, if so, to assess the damage for that separately; reserving the question how on the pleadings the verdict should be entered.

Thirdly, whether the 7*l*. 15*s*. paid into court was enough to cover a reasonable compensation for the consequential damage accruing from the cutting of the timber, including in that the question whether the damage to the pony was under such circumstances that it might have been reasonably contemplated by the parties as a kind of damage likely to arise from the felling of the timber; telling them, that, if this turned the scale, to say how much they allowed for that.

Fourthly, whether the roofs and walls were out of repair, and what compensation the plaintiff was entitled to for that; telling them, that if the roof leaked (from defective gutters as some of the witnesses had

in the case of the rooks, *Hannam v. Mockett*, 2 B. & C. 934 (E. C. L. R. vol. 9); 4 D. & R. 518 (E. C. L. R. vol. 16). The second breach is, that Rees, claiming and having through and under the plaintiff a right so to do, entered upon the land over which the plaintiff had by virtue of the indenture declared on the exclusive right of shooting and sporting, and cut down and destroyed the furze and underwood, and so evicted the plaintiff from and disturbed him in the enjoyment of his said right of shooting and sporting. Assuming that to be a good breach, the question is, whether the grant of a right of shooting and sporting over land implies a covenant that the lessor will not cut down furze and underwood, so as to deprive the game of the natural cover, even though such cutting be done in the ordinary and reasonable cultivation and user of the land. It may be that the lessor covenants impliedly that he will not wilfully destroy or drive away the game: but that is all. [WILLES, J.—There is another point before you get to that. The right to cut the furze and bushes is claimed by Rees under his lease; and that lease reserves to the lessors “all timber and other trees, mines, minerals, and quarries on the said farm.”] It is enough for the defendants to say that the exception out of the demise to Rees, is in terms the same as that contained in the lease to the plaintiff.(a)

*259] *Bowen and C. E. Coleridge*, in support of the rule.—The words of the reservation in Rees’s lease did not, it is submitted, except the rabbits. Rabbits have never in any sense been considered as game. In *Woolrych on the Game Laws* 1, it is said: “In reading the history of the game laws, care must be taken not to confound the creature which is entitled to rank as game, with that which required a certificate (as is still the case), in order legally to take or destroy it. Whatever may now be the rule, these matters were at one time by no means synonymous. Rabbits cannot be shot under some circumstances without paying a tax to the government: but, although protected, and especially in a warren, conies were never numbered in the list of game. The same observation will apply to a woodcock and snipe, and to quails and landrails, which are still within the rule of the certificate. The statute of 1 W. 4, c. 32, has created a vast alteration in the rights and usages which belong to this subject. The 2d section defines ‘game,’ for the purposes of the act. Game shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards. And the 5th section expressly saves the law respecting certificates. In considering game, again, the law of warrens must be withdrawn from the general principles; for, grouse, although game, are not birds of warren; and conies, *although not game*, (b) are yet entitled to more protection in a warren than elsewhere: and a man may, by virtue of his free-warren, *make

*260] coney-burrows throughout his manor.” Conies in a free-warren have a peculiar protection: see *Manwood’s Forest Laws*, c. 3. In *Fitz. N. B.* 87 are two writs, for entering a warren and taking

(a) The reservation in the lease to the plaintiff is, of “all timber and other trees, *underwood, thorns, and bushes* growing on the land, as well as all mines,” &c. That, however, applies only to the 60 acres demised to the plaintiff and occupied by him with Upton Castle, and not to the 264 acres called “Upton Farm” demised to Rees, over which the plaintiff had merely the right of sporting.

(b) See *Valtes’s Case*, 1 *Ld. Raym.* 151: per *Ashurst, J.*, 3 *T. R.* 21.

conies. In Chitty's Game Laws 128, it is laid down that "rabbits are not in legal acceptation game, nor are they included in any statute relative to it, unless expressly named." In *Rex v. Yaites*, 1 *Ld. Raym.* 151, it was held that the 4 & 5 *W. & M. c. 23* extended only to game and not to rabbits kept in a private warren. Rabbits are not dealt with as game in the 5 *Anne, c. 14*. In *The King v. Thompson*, 2 *T. R.* 18, a conviction on that statute, Ashhurst, J., says: "Whether the party kept a gun for the purpose of killing *game* is a question of law; for, an *ignorant* witness in the country might fancy that a woodcock or a rabbit was game." The 52 *G. 3, c. 93, Sched. (L)* is important: it imposes a duty for the use of any dog, gun, &c., "for the purpose of taking or killing *any game* whatever, *or any woodcock, snipe, quail, or landrail, or any conies,*" &c. So, the Night Poaching Act, 9 *G. 4, c. 69*, speaks of rabbits as contradistinguished from game; as also do the 1 & 2 *W. 4, c. 32*, and 7 & 8 *Vict. c. 30*. Again, the Game Certificate Act, 23 & 24 *Vict. c. 90*, imposes a duty on a certificate to use any dog, gun, &c., for the purpose of taking or killing "any game whatever, *or any woodcock, snipe, quail, or landrail, or any conies, or any deer.*" Game has never been held to include rabbits. [MONTAGUE SMITH, J.—Do you mean to contend that if Evans were sporting over Rees's land, in the exercise of the right reserved to him, and a rabbit turned up, he could not shoot it? WILLES, J.—Or a snipe or a woodcock?] This court, in *Padwick, app., King, resp.*, 7 *C. B. N. S. 88* (*E. C. L. R. vol. 97*), entertained grave doubts whether rabbits were within a reservation of "game" like this. *Thomas v. Fredricks*, 10 *Q. B. *775* (*E. C. L. R. vol. 59*), though apparently a decision that, under a contract to make good damage done by game, damage done by rabbits was included, is in reality no authority: it was not a direct decision upon the subject. The words of an exception of this sort are to be taken most strongly against the grantor. In *Graham v. Ewart*, 11 *Exch. 326*, the reservation was of the right of "hunting, shooting, fishing, and fowling," in general terms: and, at the close of the judgment, Martin, B., says,—p. 349,—“We think it right to add, that, in our opinion, the exclusive right is, to shoot *game*, commonly so called, and that it does not extend to *animals* and small birds *not of that description.*” In the report of Spicer, app., Barnard, resp., in 28 *Law J., M. C. 177*, Lord Campbell is represented to have said,—“This (*viz.* the killing of the rabbits) was not done as an act of sporting, but for the purpose of protecting the produce of the land. The tenant may kill rabbits for that purpose.” And Crompton, J., adds: “You should put it in the lease and tie up the tenant, if you wish to prevent him from killing the rabbits. It is a matter of contract between the landlord and the tenant: under the 12th section (of the 1 & 2 *W. 4, c. 32*), the tenant had a right to kill the rabbits.” As to the cutting of the furze and underwood. The covenant for quiet enjoyment was, “without any interruption by the defendant and R. D. J. Evans or either of them, or any person or persons whomsoever lawfully claiming by, from, or under him, them, or any of them.” The acts complained of as an eviction were acts done by Rees, claiming under the defendant. The exception in Rees's lease was merely of “*all timber and other trees, mines, minerals, and quarries:*” there is no exception of furze and

underwood. In Platt on Leases, vol. 2, p. 42, it is said: "After much discussion on the point, it seems to be now settled that an exception of *the woods, underwoods, coppices, and hedgerows, com-
 *262] prises the soil itself on which they grow; but that an exception of all timber-trees or great wood, *which terms do not include underwood* and herbage, operates on so much only of the soil as may be necessary for their nourishment and support; the soil is not excepted absolutely, but sub modo only; and, if the lessor destroy the trees, the land on which they grow will belong to the lessee:" and for these propositions several authorities are cited. The covenant amounts to an implied covenant that the land should be kept in a reasonably fit condition for the purpose of sporting. The act of Rees in destroying the furze and underwood was found by the jury to have virtually destroyed that which the defendant professed to grant to the plaintiff. In Bacon's Abridgment, *Waste* (C), 2, it is said, that, "If the tenant cut down timber-trees, or such as are accounted timber, as is aforesaid (oak, ash, and elm), this is waste; and, if he suffers the young germins to be destroyed, this is destruction. So it is if the tenant cut down underwood (as he may by law), yet, if he suffers the young germins to be destroyed, or if he stub up the same, this is destruction." [WILLES, J.—Cutting underwood at due intervals is the only way of enjoying it.] In *Berriman v. Peacock*, 9 Bingh. 384 (E. C. L. R. vol. 23), 2 M. & Scott 515 (E. C. L. R. vol. 28), Tindal, C. J., says: "According to the old authorities, the general property in trees is in the landlord, and the general property in bushes is in the tenant; although, if he exceeds his right, as, by grubbing up or destroying fences, he may be liable to an action of waste. We should be introducing a distinction never drawn before, if we were to decide that when a tenant cuts rather more than he ought, the property in bushes so cut passes to the landlord." The defendant is clearly liable to the plaintiff for any
 *263] interference with or interruption of his right of sporting, *whether by his own act or by that of any person claiming from or under him.

ERLE, C. J.—I am of opinion that this rule should be discharged, and that the verdict should stand as entered by my Brother Blackburn. The action is brought to recover damages for the breach of a covenant for quiet enjoyment contained in a lease whereby the defendant and another person, since deceased, demised to the plaintiff, amongst other things, the exclusive right during the term of shooting and sporting over and taking the game, rabbits, and wild-fowl upon, amongst others, lands in the occupation of one Rees, covenanting that the plaintiff should peaceably and quietly possess and enjoy the said premises so to him thereby demised and granted for and during the term, without any interruption by the lessors or either of them, or any person or persons whomsoever lawfully claiming by, from, or under him, them, or any of them. The declaration alleges for breach that, after the making of the indenture, and during the term, Rees, then lawfully claiming the right to shoot the rabbits in and upon the said lands through and under the lessors, and having a good title to the same through and under them, entered into and upon the same lands, and shot and killed and carried away large quantities of rabbits there, and evicted the plaintiff from the enjoyment of the said exclusive right of shooting and sporting and taking the said rabbits so to

him demised and granted as aforesaid: and there is a traverse of that allegation. It appeared that the lease under which Rees held his farm (besides a reservation of the timber, mines, and quarries) excepted and reserved to the lessors or lessor "the exclusive right of shooting, fishing, and sporting on the said farm," and also a proviso that it should be lawful for the lessors or lessor, and their *or his agents, [*264 surveyors, servants, or *others by their or his authority*, at all seasonable times during the demise to enter into and upon the demised premises *for any of the purposes mentioned in the reservations hereinbefore contained, &c.* The right of shooting, fishing, and sporting excepted out of that lease, the defendant has granted to the plaintiff. The first question is, whether Rees had under his lease a right to shoot the rabbits on his land. I am of opinion that he had not. I take the reservation of the right of shooting, fishing, and sporting, to be a reservation of the right to follow and shoot such animals as are in common parlance understood to be the subjects of sport. It is contended, for the plaintiff, that the reservation is confined to "game" in its strict sense. But the word "game" is not mentioned: and it is a perfectly undefined word, and one which has been used at various times in different senses, sometimes narrower, sometimes more comprehensive. If the reservation here had been of the "game" on the estate, perhaps we should have been bound to construe it according to the sense in which the word has been used in most of the modern statutes. But, under the terms of this reservation, I think the lessors clearly had a right to the rabbits. Where a tenant takes the lease of a farm with such a reservation, if he has reason to fear that the number of rabbits will be excessive, he may stipulate for compensation for damage to the crops, or that the landlord shall employ a gamekeeper to keep them down, or that he himself shall have liberty to do so, or the like. But there is only one suggestion by Rees in the course of his correspondence with the lessor, that the rabbits are too numerous. The next question arises upon the second breach, which alleges that Rees, lawfully claiming, and in fact having through and under the lessors, the right to cut down divers furze-covers, woods, and *plantations in and upon the lands over which the [*265 plaintiff had under and by virtue of the said indenture the exclusive right of shooting and sporting, cut down and carried away and destroyed divers quantities of the said furze-covers and plantations, and thereby evicted the plaintiff from and disturbed him in the enjoyment of the said right of shooting and sporting in and over the said lands. It is contended on the part of the plaintiff that the covenant for quiet enjoyment of the premises demised and granted, was impliedly a covenant not to grub up or destroy the furze and underwood; and so the breach of it was an eviction of the plaintiff from his right of sporting. To this it seems to me there is a short answer. There has been no eviction. The plaintiff has just as much right to shoot and sport over the thirty or forty acres of land which has been so treated as he had before: and that is all the plaintiff covenanted that he should have. If a portion of the land had been sown with turnips or clover, which are favourable to partridges, it would be idle to say that the grantor was guilty of a breach because his tenant in a future year chose to adopt some other mode of cultivation of the

land. The same argument applies where thirty or forty acres of furze and underwood out of a farm of 300 acres is cut down for the better cultivation of the farm. If there had been a covenant to keep up the cover, of course it would be a breach of covenant to grub it up. But, upon the whole, I see no breach here of any of the covenants which we have to deal with upon this rule.

WILLES, J.—I am of the same opinion. Nothing can be more general than the words of this reservation: it is of “the exclusive right of shooting, fishing, and sporting over the said farm.” There is no reason why that should not be generally understood as including *266] anything that is usually hunted for, shot for, and sported after. I would only add that many of the creatures referred to in the books as not falling within the description of game at the present day, were yet included amongst those which belonged to a warren, such as quail, landrail, woodcock, and heron, in the days of hawking. Could it be reasonably contended now, that, though the right of sporting were reserved by a demise in general terms, the tenant might shoot woodcocks, quails, and the like? As to the authority I referred to,—*Graham v. Ewart*, 11 Exch. 326,—I have had an opportunity of speaking to my Brother Martin about it; and I find, as I had supposed, that the expression *game* commonly so called, was not intended to limit it to what had in acts of parliament been from time to time called game; but to such things as are usually sported after,—excluding small birds and vermin which are beneath the notice of a sportsman. It seems to me, therefore, that Rees did not under the demise to him acquire a right to kill the rabbits on his farm, and consequently that upon the first point the plaintiff fails. As to the other point, the argument urged on the part of the plaintiff would have been entitled to much weight if the grant had been of the woods and underwoods; though, if it had been a grant of the latter, I should have thought that the tenant might lawfully have cut the underwood in the usual and accustomed way. But that question does not arise here: the grant is of the exclusive right of fishing and sporting over and taking the game, rabbits, and wild-fowl on the land demised and on that under lease to Rees. I apprehend that such a grant as that does not prevent the landowner or his tenants from using the land in the ordinary and accustomed way, provided they do not resort to any expedients for destroying or driving away the game. Cutting *267] furze and underwood in the ordinary course of the cultivation of the land, cannot be said to be a wilful destruction of the game. I will only add that I am not aware of any instance of an action being sustained for the breach of a covenant for quiet enjoyment, where the grantor had that which he professed to grant, and has done no act to disturb the grantee in the possession of it. Here, the grantor had demised the land to Rees, covenanting with him in terms which amount to a re-grant of the right of shooting and sporting; and the right so reserved he has granted to the plaintiff. That which he professed to grant to the plaintiff, the defendant had: and the interruption of that right by the acts imputed to Rees is not such an interruption as the parties have stipulated against. Upon both points, therefore, it seems to me to be quite clear that the defendant is entitled to succeed. The rule must consequently be discharged.

BYLES, J.—I do not dissent from the conclusion to which my Lord and my Brother Willes have arrived. I would only observe that quail, woodcock, and the like, do not stand quite in the same position as rabbits. They do not become so numerous as to become a nuisance like rabbits, which seem to have been destroyed here solely because they were in such excess as to eat up the tenant's crops. As I view the question, it was one of evidence only.

MONTAGUE SMITH, J.—I also am of opinion that this rule should be discharged. The reservation in Rees's lease is to be read as a regrant of the right of exclusive shooting and sporting, including the right to kill rabbits. The right so reserved in the lease to Rees is in terms granted to the plaintiff. It seems to me that the killing of the rabbits by Rees was not done lawfully, and therefore that there was no breach by the *defendant of the covenant for quiet [*268 enjoyment in the lease to the plaintiff. Upon the second point also I think the defendant is entitled to retain the verdict, because it appears to me that the cutting of the furze and underwood, which may have been done in the ordinary course of good management of the farm, was not an interruption of the enjoyment of the incorporeal hereditaments granted to the plaintiff. He had the same right to sport over the land as before. If he wished to have the condition of the land as to furze and underwood preserved, he should have expressly stipulated that the present mode of cultivation of the land should not be altered. The reservation out of Rees's lease was in terms the same as the grant to the plaintiff. Rees did what he did (as to the killing the rabbits) unlawfully, and consequently the defendant's covenant with the plaintiff is not broken.

Rule discharged.(a)

(a) See the next case.

BIRD v. THE GREAT EASTERN RAILWAY COMPANY.

June 13.

1. By a memorandum not under seal, the plaintiff hired of the owner of land the sole and exclusive liberty of shooting and fishing over it for three years. A portion of the land was (pending the term) sold to the defendants, who constructed a line of railway across it, to the great detriment of the plaintiff's right of sporting:—Held, that the plaintiff had not such an interest in the land as to entitle him to claim compensation under the Lands Clauses Consolidation Act, 1845.

2. *Seemle*, that a grant under seal would have given him no better title.

THIS was a special case stated for the opinion of the court without pleadings, pursuant to a judge's order. The action was brought under the 68th section of the Railways Clauses Consolidation Act, 1845. The plaintiff, claiming to be entitled to compensation under the circumstances hereinafter stated, gave the company a *notice [*269 under that section, requiring them to issue their warrant to the sheriff to summon a jury. The defendants, disputing the plaintiff's title to any such compensation, did not issue their warrant within the twenty days, and thereupon the action was brought for the amount of compensation specified in the notice.

The real point in dispute between the parties not being as to the
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amount of compensation, but as to the plaintiff's title to any compensation at all, it was agreed between them, that, in the event of the point being decided in the plaintiff's favour, he should waive the right to the particular sum claimed in his notice, and that the amount of compensation should be ascertained by a reference, in the mode prescribed by the order.

The opinion of the court upon the real points in dispute was therefore requested on the following case:—

1. The Eastern Counties Railway Company were by the Eastern Counties Railway Act, 1861 (24 & 25 Vict. c. ccxxi.), which incorporated the Railways Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Act, 1845, authorized to make a railway, being No. 4 in section 7 of that act.

2. By the Great Eastern Railway Act, 1862 (25 & 26 Vict. c. ccxxiii.), the Eastern Counties Railway Company has been amalgamated with other companies, and has become the Great Eastern Railway Company (the defendants), on which latter company it is to be assumed, for the purposes of this case, that all the rights and liabilities of the former company have devolved.

3. John Elton Hervey Elwes being seised in fee of all the lands and hereditaments hereinafter mentioned, a document in writing, not *270] under seal, was on the 3d of March, 1862, signed by him and the plaintiff, of which the following is a copy:—

“Memorandum of agreement made this 3d of March, 1862, between John Elton Hervey Elwes, of, &c., hereinafter called ‘the landlord,’ of the one part, and Robert Wilberforce Bird, of, &c., hereinafter called ‘the tenant,’ of the other part, Whereby the said landlord agrees to let all that mansion-house known as Stoke College, in the county of Suffolk, with the offices, buildings, coach-house and stables, lawn, pleasure-ground, and garden, and eighteen acres of meadow or grass land thereto attached, be the same more or less (as late in the occupation of W. W. Winch, Esq.), together with the fixtures, furniture, china, glass, and effects, as more particularly described in an inventory, &c., together with the sole right of shooting and fishing over the whole estate of Stoke College, and the lands belonging to the same landlord, the same consisting of 3000 acres, more or less, from the 25th day of March instant, for the full space or period of three years, at and for the clear yearly rental or sum of 275*l.*, payable half-yearly, on the 25th of March and the 29th of September, the first of such half-yearly payments to become due and be made on the 29th of September next: And the said tenant agrees to take the house on the terms aforesaid, and to pay the rent as the same shall become due; to use the said premises solely as a private residence, and not to underlet or part with possession of the same without the consent in writing of the said landlord for that purpose first had and obtained; and not to remove or suffer to be removed therefrom under any pretence whatever the whole or any part of the said furniture and effects; to keep and at the expiration of the said tenancy to quit and deliver up possession of the said residence, premises, and furniture as per inventory aforesaid, in as *271] good order, state, and condition as the same now are, fair wear and tear and accidental damage by fire in the meantime excepted; and, in the event of any loss, damage, or breakage, other

than hereinbefore provided for, to make good the same or allow a fair compensation, the amount thereof, if in dispute, to be settled by two valuers or their umpire in the usual manner; and, should either party neglect or fail to appoint a valuer within seven days after notice given by the other party, or should such valuer when appointed neglect or refuse to act within the time appointed, or object to the appointment of an umpire, then the valuer already appointed may proceed alone, and his decision shall be final and binding on all parties. The said tenant further agrees at his own expense to keep and leave the said gardens properly stocked and cropped, according to the season of the year, and to keep the roofs and gutters of the premises clear from leaves and snow; not to alter the present arrangement of the garden grounds, lawns, or shrubberies, nor, without obtaining the consent in writing of the said landlord, to lop, cut, or remove any timber or timber-like trees, shrubs, or fences which may be growing or standing on the said premises, except the necessary pruning in garden arrangements; not to mow any of the grass land twice in any one year; to keep down the rabbits on the estate, so as to prevent their becoming so numerous as to be a nuisance to or cause of fair complaint from the tenants of the farms, or, failing this, after due notice from the landlord, to allow the said landlord, his servants or keepers, to enter in and upon the said lands and kill and destroy the said rabbits. The said landlord agrees to keep the said mansion-house and premises, and the water-pipes and pumps in good and substantial repair, and to pay and discharge all rates, taxes, tithes, and other charges *payable in respect of the said premises during the said tenancy. It is hereby further agreed that the said tenant [*272 shall have the option of giving six months' notice, viz. on or before the 29th of September, 1864, in writing, to the said landlord, prior to the expiration of the tenancy hereby granted, of renewing the said tenancy for a further period of two years, upon the terms and conditions of the present agreement; and, should he exercise such option, he shall have a further power of extending the tenancy, on the terms aforesaid, for a second period of two years, making seven years in all, by giving notice to the said landlord, in writing, on or before the 29th of September, 1866: and, should the said tenant during the said tenancy decorate or cause to be decorated and painted the ball-room on the said premises, the said landlord agrees to allow the sum of 25*l.* from the half-year's rent during which such decorations are effected, provided the said tenant should produce vouchers and receipts to prove that a sum of not less than 25*l.* has been expended in such decorations and paintings: Provided always, that, in case the said rent or any part thereof shall remain due or unpaid for the space of twenty-one days after the day upon which it shall have become due, or if the said tenant shall commit a breach of the conditions of this agreement, then and in such case it shall and may be lawful for the said landlord, or his duly-authorized agent, to re-enter and take possession of the said premises, and thereout to amove the said tenant, or any other person or persons therein, without the necessity of bringing an ejectment or taking any legal or equitable proceedings for the recovery thereof: Lastly, it is mutually agreed that the charge for

two fair copies of this agreement shall be paid by the said landlord and the said tenant in equal moieties of 21s. each.

*273] 4. The defendants, being empowered by the *before-mentioned acts, for the purpose of constructing the said railway, to purchase and take the land which they are herein stated to have purchased, gave to the said John Elton Hervey Elwes a notice under the 18th section of the Lands Clauses Consolidation Act, 1845, stating therein that they required to purchase and take the said land, and demanded from the said John Elton Hervey Elwes the particulars of his estate and interest therein, and of the claims made by him in respect thereof; and the said notice stated the particulars of the land so required, and that the defendants were willing to treat for the purchase thereof and as to compensation to be made by all parties for the damage that might be sustained by reason of the execution of the works.

5. In pursuance of that notice, and by virtue of the powers of their acts of parliament, the defendants purchased of the said John Elton Hervey Elwes part of the land over which the document before set forth purported to agree to let to the plaintiff such right of shooting as aforesaid; and the said purchased land was conveyed to the defendants in fee by the said John Elton Hervey Elwes; and the defendants constructed part of the said railway thereon.

6. The said part of the said railway is on the whole about 2 miles, 1 furlong, and 83 yards long, and contains in area 23 acres, 2 roods, 13½ perches; and it intersects the land over which it was agreed as aforesaid that the plaintiff should have the said right of shooting, so as to leave a considerable part of the said land on each side of the said railway.

7. It is admitted that the shooting on that part of the said land which was not purchased as aforesaid was and is in fact prejudiced and diminished in value by the construction of the said part of the said railway.

*274] 8. It is also admitted that the shooting on the said *purchased land is in fact prejudiced and diminished in value by the construction of the said part of the said railway.

9. From the time of making the said agreement with the plaintiff to the time of the conveyance to the defendants, the said John Elton Hervey Elwes continued to be seised in fee of all the lands and hereditaments mentioned in the said agreement; and, from the time of the conveyance to the said defendants hitherto, he has continued so seised thereof, except the part so conveyed.

10. If the plaintiff ever was or is entitled in equity to a legal grant of the right of shooting referred to in the said document, nothing, except so far (if at all) as herein appears, has occurred to destroy his right to such grant.

11. It is not admitted by the defendants that the plaintiff was interested in lands, or that the damage and diminution of value herein stated is an injurious affecting within the meaning of the Lands Clauses Consolidation Act, 1845.

12. These were questions on which the parties differed, and were matters for the consideration of the court. The court was to have the

power of drawing such conclusions of fact as they might think a jury ought to draw.

The question for the court was, whether, under the circumstances herein stated, the plaintiff was entitled to any compensation; and, if to any, in respect of what, is he so entitled.

If the court should be of opinion that the plaintiff was entitled to any compensation, the amount was to be ascertained in the mode prescribed in the said order: and the plaintiff was to have judgment for the amount, with costs of suit. If the court was of opinion that the plaintiff was not entitled to any *compensation, judgment of *nolle prosequi* was to be entered for the defendants, with costs [*275 of defence.

Mellish, Q. C. (with whom was *Mayd*), for the plaintiff.(a)—The question is, whether the plaintiff is entitled to compensation for the injury which it is conceded has been done to the shooting by the construction of the railway across the land; and it resolves itself into three points,—first, whether the right of shooting is such a profit arising out of the land as to entitle the plaintiff to claim compensation under the 68th section of the Lands Clauses Consolidation Act, 1845, for its injurious affection by the works of the company,—secondly, whether, assuming it to be an interest in land, the construction of the railway was an *injurious affection within the statute,—thirdly, whether [*276 the right of the plaintiff is affected by the fact of its being an equitable and not a legal interest. The right of shooting is part of the value of the land. If the owner of the land has parted with it to a third person, such third person would be entitled to that portion of the compensation which would be given for the shooting. That the plaintiff's interest has been injuriously affected, is conceded. The only question is, whether it is an interest in land within the 68th section of the statute. The circumstance of its being an incorporeal hereditament does not, it is submitted, prevent it from being the subject of compensation. [WILLES, J.—To entitle a party to compensation under s. 68, is it not necessary that the claimant should have some legal interest in the land?] It is enough that the party has an equitable interest. The 7th section deals with equitable interests, amongst others. A court of equity will consider that to be done which ought to be done. There is no disability or defect of title here: it is only the conveyance which is imperfect, and that a court

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the right of shooting on the land mentioned in the agreement is an interest in respect of which compensation can be claimed:

"2. That, although such right may lie in grant, yet that the agreement gave the plaintiff a right in equity in respect of which equitable interest compensation can also be claimed:

"3. That the said interest entitles the plaintiff to compensation in respect of the land which was actually taken:

"4. That the adjoining land was injuriously affected by the railway, by reason of its injuring the shooting there, and that the plaintiff's said interest entitles him to compensation in respect thereof:

"5. That, even if no claim can be made for injury to the shooting on land, by reason of the proximity of a railway, if no part of the land is taken; yet, if part of the land is taken, the company must pay for any damage thereby caused to the shooting, as it is one of the natural advantages of the land, which enhances its value:

"6. That the plaintiff being entitled to the shooting for a term, a portion of the compensation (the whole of which, if he retained the shooting, would be payable to the owner of the fee) is payable to the plaintiff, and the owner of the fee is entitled to so much less."

of equity will remedy. Equity will not allow a title to fail for the want of a seal. In *Moreland v. Richardson*, 22 Beavan 596, certain persons had purchased family graves in perpetuity in a private burying ground which was afterwards closed by order of the Queen in council: there was no formal grant executed, but their title was merely evidenced by a receipt for the purchase-money, stating the purchase: and it was held that they were entitled to an injunction to restrain the trustees from removing or injuring the graves or grave-stones, &c. [BYLES, J.—That was in the nature of an easement. Assuming the grant here to have been by deed, would it pass any interest in the land?] It is submitted it would. In *Wickham v. Hawker*, 7 M. & W. 63, it was held that *the grant to a person, *his heirs and assigns*, of “free liberty, with servants or otherwise, to come into and upon lands, and there to hawk, hunt, fish, and fowl,” is a grant of a *license of profit*, and not of a mere *personal license of pleasure*; and therefore it authorizes the grantee, his heirs and assigns, to hawk, hunt, &c., *by his servants, in his absence*: and such a liberty is therefore a *profit à prendre* within the Prescription Act, 2 & 3 W. 4, c. 71, s. 2. [WILLES, J.—This is not the purchase of the right, but a mere license to exercise it. Would the court of equity direct a legal conveyance of it?] The court of equity would at all events restrain the grantor from doing anything to derogate from his grant. [WILLES, J.—Could the company set up this agreement as an answer pro tanto to the claim for compensation by the owner of the land?] The value of the land is diminished by the grant of the shooting. [BYLES, J.—It would be rated at less or more according as the landlord retained or parted with the shooting, if let to a tenant.(a)] Various provisions (ss. 99–115) are found in the statute as to rights of common, mortgages, and rent-charges, in respect of which the company must deal with the person having the equitable interest. By the interpretation clause, s. 3, the word “lands” is to be construed to extend to “messuages, lands, tenements, and *hereditaments of any tenure*.” In *Sweetman v. The Metropolitan Railway Company*, 10 Law T. N. S. 156, it was held that a tenant of premises under an agreement for a lease for the residue of a term of seventeen years, though at law a mere tenant from year to year, is not “a person having no greater interest therein than as tenant from year to year,” upon the true construction of the 121st *section of the act. It is submitted that the plaintiff here had at all events an equitable interest in the land, and that persons having equitable interests are as much entitled to be compensated as those whose interests are strictly legal.

Bidder (with whom was *Bovill*, Q. C.), for the defendants.(b)—The

(a) See *The Queen v. Williams*, 23 Law Times 76; *The Queen v. The Inhabitants of Thurlstone*, 1 Ellis & Ellis 502 (E. C. L. R. vol. 102), 28 Law J., M. C. 106.

(b) The points marked for argument on the part of the defendants were as follows:—

“1. That the plaintiff had no lands or interest in any lands which were taken for or injuriously affected by the execution of the defendants’ railway:

“2. That the plaintiff’s interest in lands, if any, was not injuriously affected by the execution of the said railway:

“3. That the plaintiff had neither a legal grant nor an equitable right to enforce a grant of the right of shooting over the lands in question:

“4. That, even if the plaintiff had had a legal grant of the said right of shooting, such grant

argument resolves itself into three points,—1. that, assuming that the instrument under which the plaintiff claims conveyed to him any legal right, it is not an interest in land within the 68th s. of the Lands Clauses Consolidation Act, 1845,—2. that, admitting that it is an interest in land, there has been no injurious affection by the company's works,—3. that, the instrument not being under seal, it conveyed nothing to the plaintiff. 1. *Wickham v. Hawker*, 7 M. & W. 63, shows that a grant of this sort amounts to no more than a mere license: whether it be a *personal license of pleasure, extending only to the individual, [*279 or a license of profit, which he may exercise by his servants, still it is only a license: see *The Duchess of Norfolk v. Wiseman*, Year Book, 12 H. 7, fo. 25, and 13 H. 7, fo. 13, pl. 2; *Manwood's Forest Laws*, c. 18, s. 3, p. 107. 2. Assuming this to be a profit à prendre, it is submitted that it is not included in the description of an interest in land in s. 68. The interpretation clause, s. 3, provides that "*lands shall extend to messuages, lands, tenements, and hereditaments of any tenure.*" In *Viner's Abridgment, Tenure (B)*, it is said, "Pischary does not lie in *tenure*; for, the soil may be to one, and the pischary to another, and then the lord cannot distrain,"—citing *Br. Tenures*, pl. 75, who refers to *Fitzh. Scire Facias*, 100. An owner of tithes was held not to be entitled to compensation under an act of parliament containing similar words: *The King v. The Commissioners of the Nene Outfall*, 9 B. & C. 875 (E. C. L. R. vol. 17), 4 M. & R. 646. Bayley, J., there says: "The 35th section (of the 7 & 8 G. 4, c. lxxxv.) gives the right to compensation to the persons interested in the *lands, tenements, or other hereditaments*. The rector or vicar is not interested in the land out of which the tithe arises. When the tithe arises, his interest then accrues. The owner of the soil may, if he pleases, use the land in such a manner that it shall not produce tithe, and the rector then can get no tithe. He not having any legal interest in the land out of which the tithe is to arise, in point of law, cannot be considered to have sustained any injury by reason of its non-production. He has no right by law to insist upon the land being used in such a manner that it shall produce tithe. That being so, he is not entitled to compensation under this act of parliament." And *Littledale, J.*, said: "It is insisted that the right of the rector to take tithe being an incorporeal hereditament, *he is entitled to compensation, because he is a person inter- [*280 ested in an hereditament. I think the right of the rector to take the tithe is not an hereditament within the meaning of that word in this act of parliament. It certainly is not an hereditament wanted for the purpose of the act. It is true that he may have sustained damage by reason of the commissioners having taken the land for the purposes of the navigation, and thereby rendered it incapable of producing tithe. That is not a damage which the law considers as

would not give the plaintiff an interest in lands within the meaning of the Lands Clauses Consolidation Act:

"5. That, if the plaintiff had such an equitable right as aforesaid, such an equitable right is not an interest in lands within the meaning of the said act:

"6. That the diminutions in value of the plaintiff's legal or equitable right of shooting (if any) over the lands taken by the defendants, and over the lands not so taken, are not, nor is either of them, an injurious affecting within the meaning of the said act."

constituting any injury to the rector. There must be a damage accruing from the wrongful act of another, to constitute a civil injury. If the owner of the land had suffered it to lie waste, and thereby rendered it incapable of producing tithe, the rector would sustain a damage, and yet he could not maintain any action against the landowner, because the damage would not have been caused by any wrongful act." The ordinary test of the right to compensation in these cases, is, whether, in the absence of an act of parliament, an action would have lain against the company for doing that which is complained of: *The Caledonian Railway Company v. Ogilvy*, 2 Macq. 229; *In re Penny and The South Eastern Railway Company*, 7 Ellis & B. 660 (E. C. L. R. vol. 90), 26 Law J., Q. B. 225; *New River Company v. Johnson*, 2 Ellis & Ellis 435, 29 Law J., M. C. 93. [BYLES, J.—In *The King v. The Commissioners of the Nene Outfall*, 9 B. & C. 884 (E. C. L. R. vol. 17), Parke, J., says,—“The act seems to have intended to provide compensation for those who could have maintained an action for the things done by the commissioners, if they had not had the authority of parliament.”] Suppose the owner of the estate had himself made this railway, would he have been liable to an action at the suit of this plaintiff? Many ancient authorities on the subject are collected in *Holford v. *Bailey*, 8 Q. *281] B. 1000 (E. C. L. R. vol. 55). 3. Then, there being no legal grant of the shooting and fishing, the plaintiff clearly has no right to compensation under the statute. He has by this instrument no interest in any land: at the utmost, he has a right to invoke the aid of a court of equity to have such an interest conveyed to him. The only person here entitled to call upon the company for compensation under the statute, was, the owner of the land. The company could not set up this agreement in answer to or in mitigation of his claim. It must therefore be assumed that the defendants have paid Elwes the full value of all that he has lost, and full compensation for all damage and inconvenience which he has sustained, by the construction of their railway. It may be that a court of equity would compel him to hand over to the plaintiff a portion of the compensation. In the interpretation clause of the act “lease” is declared to comprehend an “agreement for a lease:” but this is not a lease; it is a mere license: *Bird v. Higginson*, 2 Ad. & E. 696 (E. C. L. R. vol. 29), in error, 6 Ad. & E. 824 (E. C. L. R. vol. 33). In *Sweetman v. The Metropolitan Railway Company*, 10 Law T. N. S. 156, the tenant had a legal interest at least as tenant from year to year, with an equitable interest for seventeen years. Having got compensation in respect of the former, he could not demand a second assessment in respect of the latter.

Mayd, in reply.—The case of *The King v. The Commissioners of the Nene Outfall* has no application. The rector there could have had no action against the owner of the soil for omitting to cultivate it. Nor is this like the case of *Jeffryes v. Evans*, recently before the court (ante, p. 246). Here the plaintiff's right to go over a large portion of the land has been clearly affected in an injurious manner.

*282] *ERLE, C. J.—I am of opinion that our judgment in this case must be for the defendants. The question raised between the parties is, whether the plaintiff is a person entitled to compensa-

tion under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), in respect of any lands, or any interest therein, which have been injuriously affected by the execution of the defendants' works. It appears that by a memorandum of agreement of the 3d of March, 1862, the plaintiff hired of one Elwes for a term of three years a mansion-house and certain lands adjoining which were not affected by the defendants' works, and that he also hired the right of shooting and fishing over the whole estate of Mr. Elwes. The defendants have taken a portion of the last-mentioned land, and have constructed their railway upon it; and the plaintiff insists that thereby his right of shooting is injuriously affected. Now, the right which the plaintiff has under the memorandum of the 3d of March, 1862, which is not under seal, is a mere license, and lies only in agreement. The memorandum conveys to him no land, nor any interest in land, which could be injuriously affected by the execution of the defendants' works. All the plaintiff has lies in contract with Mr. Elwes. The great stress of the argument has been, that the parol interest which the plaintiff has under the agreement may at any time through the interposition of a court of equity be converted into an interest under seal, and therefore that the plaintiff has at least an equitable interest in the subject-matter. But I am unable to find any equitable interest *in the land*. As to what may be the relative rights of the plaintiff and Elwes, I give no opinion,—whether a court of equity would compel the latter to execute a grant under seal, or what would be its effect, is not a matter for our consideration. The right to specific performance is *confined to the parties to the contract. This is clearly [*283 laid down by Lord Cottenham in *Tasker v. Small*, 3 Mylne & Cr. 63, where he says: "It was argued at the Bar that the plaintiff was, in equity, invested with all the rights of Mrs. Small, upon the principle, that, by a contract of purchase, the purchaser becomes in equity the owner of the property. This rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property." Here, whatever the rights as between Elwes and the plaintiff, the defendants are strangers to them. They have come to the party entitled to the land, and have compensated him for the land they have taken, and have so acquired a title to the land with all its incidents, amongst others, a right to the birds in the air and the fishes in the water thereon. That is the ground upon which I rest my opinion; and it is sufficient to sustain a judgment for the defendants. Even if the plaintiff had had an interest under seal, there is much in the argument of Mr. Bidder to show that the company would not be liable to make compensation to him. He takes by his contract the right of shooting if there be game, and of fishing if there be fish. But there is no contract on the part of the landlord to keep up the quantity of game or of fish. No doubt an action would lie against Elwes, if, after having let the right of shooting and fishing, he wilfully did something to destroy the fish or to prevent the access of the game to the land. But no such question arises here: and upon the ground above men-

tioned, I am clearly of opinion that the claim of Major Bird against the railway company is unfounded.

*284] *WILLES, J.—I am of the same opinion. The plaintiff is a person who has contracted with the owner of the soil to have for three years the exclusive right of shooting and fishing over the land. I will assume that he has done so by a valid and effectual contract. In what relation does a man who has acquired a right to the exclusive shooting stand with regard to the owner of the land? The owner of the land has not contracted that he will not enjoy the land in any lawful and ordinary way which does not go directly to the destruction of the game. There are many authorities in the books as to rights to sport over the land of another. Mr. Bidder, in his able argument, has referred to several cases in relation to rights of fishing: and there are many more instances to be found in the time of the forest laws, which are collected in Com. Dig. *Chase*, besides one well-known case as to free-warren, in 1 Wms. Saund. Where these rights existed, there were stringent provisions of the law to prevent them from being injuriously affected by the owner of the land. But the books are wholly silent as to one who has a mere license to shoot or to fish over another man's land, having any right to restrain the owner of the soil in the ordinary and reasonable use of it; always excepting the malicious or intentional destruction or driving off of the game. I am quite at a loss to see how the fact of making a railroad across the land could affect the plaintiff's right of shooting any more than the making of an ordinary carriage road, or that it must necessarily be an injury in the sense of giving a right of action. I am far from saying that such acts might not amount to injuria as well as damnum. But I must protest against its being supposed to be enough to show a mere conveyance of part of the land by the landlord to a railway company, in order to give the plaintiff a right of *action, even against his

*285] landlord, without showing some covenant on the part of the latter not to disturb or interfere in any way with the game. Assuming, therefore, that the difficulty suggested by my Lord did not exist, we must not be supposed to have intimated an opinion that the facts here stated would give the plaintiff either a cause of action, or a right to claim compensation. I concur with my Lord in thinking, for the reasons he has given, that this claim is not sustainable.

BYLES, J.—I am of the same opinion: and my judgment entirely reposes upon the meaning of the words "any interest in any lands," in the 68th section of the Lands Clauses Consolidation Act, 1845. The memorandum of the 3d of March, 1862, may be a license,—of profit as well as pleasure: but it conveys to the licensee no estate: not the smallest particle of an interest in land passes to him under it at law. It is said he may go to a court of equity and perfect his legal title. I am not sure that he could. I must, however, confess myself incompetent to form a decided opinion on that subject. But it lies on the plaintiff to show that he could, before we can decide in his favour upon the ground that he has an interest in land either at law or in equity. If the plaintiff were entitled to compensation, he might be so if he had been one of a hundred licensees. I desire to say nothing to lead to an inference that there is any other mode in which the plaintiff can claim a compensation for what he has lost.

It is enough to say that he has no remedy under the 68th section of the Companies Clauses Consolidation Act.

MONTAGUE SMITH, J.—I am of the same opinion. I think the plaintiff had no interest in the land, within the meaning of the 68th section of the statute. He claims *in respect of a right of [*286 sporting: but that right seems to me never to have been created: it never existed as a separate subject-matter of property or interest in the land at all. To create such a right, there must be a deed under seal. Here there is nothing but a contract with the owner of the land that he will grant such a right. It all lies in contract. There is no hereditament existing here; no interest which is severed from the ownership of the land, and so vested in the plaintiff as to entitle him to say, that, in respect of that interest, as distinguished from the ownership of the land, he is entitled to compensation. The owner of the land remains in full possession of all the rights incident to such ownership, subject only to a contract to create this interest.

Judgment for the defendant.

The test of interest in land must be the same under statutes authorizing railroad companies to take land on making compensation to the owner, and under the Statute of Frauds.

The distinction is between a license and a grant: *Jamieson v. Milleman*, 3 Duer (N. Y. 1854) 255.

A railroad company took possession of land with the knowledge of, and without objection from, the owner, and laid their track upon it. They were held to have but a license, which was subject to revocation by the owner at any moment: *Eggleston v. Harlem Railroad Co.*, 35 Barb. (N. Y. 1859) 162.

Thus the fact that the exercise of the license requires a permanent occupation of the land does not convert the license into a grant, or repeal the Statute of Frauds: *Id.* Lowrie, C. J., curiously determined that a perpetual right to enter on one tract of land and cut timber for the purpose of keeping fences on another in repair, which would ordinarily be considered an easement, was a license, and as such revocable, but nevertheless within the Statute of Frauds: *Yeakle v. Jacob*, 9 Casey (Pa. 1859) 376.

In *Funk v. Haldeman*, the right granted was to explore for oil, and if it was discovered, to take two-thirds,

and yield one-third to the owner of the land, as a royalty. The exclusive possession of an acre about the pits dug was to terminate on the abandonment of the experiment. The court held that the right was no part of the corporate thing, which, as Woodward, C. J., remarked, remained as perfect after the right had issued, or been exercised, as before. The property was changed only as to the oil taken out of the land, and that is a chattel. There was no estate acquired in the land or minerals; but a license to work the land for minerals: 3 Smith (Pa. 1867) 229. This decision is founded on a case which contained a similar license to sever coal from the land and take it away: *Johnstown Iron Co. v. Cambria Iron Co.*, 8 Casey (Pa. 1858) 241. But if the right be exclusive to dig, take, and carry away all the coal in the land, and the price for the grant is an entire sum, this carries the *corpus*: *Caldwell v. Fulton*, 7 Id. (1858) 475.

Where one had an exclusive right, granted by deed, to dig pits and sink wells on the lands of the defendant in order to explore for mineral oil, and agreed to buy the land if oil was discovered, his interest was decided to be a personal license: *Dark v. Johnson*, 6 Am. Law Reg. N. S. (Pa. 1867) 543.

CATER v. WOOD. *June 3.*

1. The plaintiff bought of the defendant "the household furniture, fixtures, utensils in trade," &c., of a public-house, "as per inventory taken by W. W.," for 262*l.*, upon a representation by the defendant that the receipts of the house were 80*l.* per month, which representation turned out to be false. In an action for this misrepresentation, the declaration alleged the agreement to be for the purchase of the *goodwill*, furniture, fixtures, &c.:—Held, that the declaration substantially stated the true nature of the agreement, and that, at all events, the court would, if necessary, amend it.

2. The court has power, under the 222d section of the Common Law Procedure Act, 1852, to amend the record, where leave to move to enter a verdict is reserved, notwithstanding the judge at the trial expressly refuses to allow an amendment or to reserve leave to amend.

THIS was an action for a false and fraudulent representation on the sale of a public-house.

The declaration stated that the defendant possessed a public-house and premises called the Gibraltar, situate at Boxley, in the county of Kent, and there carried on the business of a publican and licensed *287] *victualler*, and also there had certain furniture, &c., and that he the defendant, with intent to deceive and defraud the plaintiff, falsely and deceitfully represented to the plaintiff and induced him to believe that his the defendant's trade was much more extensive than it really was, more particularly in this, that the business was worth 80*l.* per month, and by means of the said false and deceitful representation induced the plaintiff to enter into an agreement whereby the plaintiff agreed to give the defendant 200*l.* and 62*l.* for the goodwill of the said trade, and for the purchase of the furniture, fixtures, &c., and to pay for stock in trade not more than 25*l.*; that the plaintiff paid the 262*l.*, and entered and paid 25*l.* 19*s.* 8*d.* for the stock in trade; whereas in truth the defendant's business was worth much less than 80*l.* per month, as the defendant well knew; and by reason of the premises the said trade was and is wholly useless to the plaintiff, and the plaintiff incurred divers losses on the said business, and had been put to divers costs in the execution of the said agreements and in the discovery of the aforesaid fraud of the defendant, and in the moving of his goods, &c., and had been deprived of the benefit of the use of the money so spent, and his interest in the said public-house was of no value to the plaintiff, and the plaintiff was otherwise damaged: Claim, 500*l.*

The defendant pleaded not guilty, whereupon issue was joined.

The cause was tried before Pollock, C. B., at the last Spring Assizes at Maidstone. A witness who negotiated the purchase of the business on behalf of the plaintiff, proved the representation as to the value of the business as alleged in the declaration, and other witnesses proved, that, instead of 80*l.* per month, the takings did not average 10*l.* The written agreement was put in, when it appeared to be only *288] an agreement *for the sale of* "the household furniture, fixtures, utensils in trade, &c., as per inventory taken by William Wood," no mention whatever being made of "goodwill."

It was thereupon submitted on the part of the defendant that there was nothing to go to the jury, all the defendant agreed to sell being certain specified articles.

The Lord Chief Baron, yielding to the objection, directed a nonsuit, reserving to the plaintiff leave to move to enter a verdict for

100*l.* damages, but declining to amend the record, or to leave it to the court to do so.

The Hon. G. Denman, Q. C. in Easter Term last, accordingly obtained a rule nisi to enter a verdict for the plaintiff for 100*l.*, on the ground that there was evidence to go to the jury in support of the declaration either in its present form, or to be amended by the court under the 222d section of the Common Law Procedure Act, 1852.

Sir G. Honyman now showed cause.—The declaration in substance charges, that, by means of a fraudulent and deceitful representation, the defendant induced the plaintiff to purchase, amongst other things, the “goodwill” of the public-house in question. The agreement which was put in makes no mention of goodwill. It is an agreement specifically for certain household furniture, fixtures, utensils in trade, &c., as per inventory. The plaintiff purchased these very things. Does the use of the word “fixtures” import goodwill? [BYLES, J.—Does the agreement import that the purchaser shall sell beer on the premises in question, or the vendor?] The purchaser, no doubt. But, suppose the defendant had opened a beer-shop next door to *the Gibraltar, would he have been liable to an action? [BYLES, [*289 J.—This is not an action *ex contractu*, but *ex delicto*. WILLES, J.—All difficulty, if any there be, may be cured by an amendment of the declaration, by setting out the agreement in its terms.] The Lord Chief Baron expressly declined to reserve to the plaintiff leave to amend. [WILLES, J.—He could not restrain the general power of the court to amend, under the 222d section of the Common Law Procedure Act, 1852, where leave to move is reserved.]

Denman, Q. C., and *Willoughby*, were not called upon to support the rule.

ERLE, C. J.—I am of opinion that the rule should be made absolute to enter a verdict for the plaintiff for 100*l.* It appeared that the plaintiff entered into an agreement with the defendant whereby the former was to pay to the latter 262*l.* on his delivering up to him the possession of the public-house and premises, together with the household furniture, fixtures; utensils in trade, &c., as per inventory taken by William Wood. It also appeared that the 262*l.* was paid, and the plaintiff let into possession; and it appeared upon the evidence, and was found by the jury, that the defendant represented the takings of the public-house to be 80*l.* per month, and that that representation was fraudulent and untrue. The evidence was, that the defendant falsely and fraudulently represented the value in respect of the business carried on upon the premises, when bargaining for a sale of the fixtures and utensils in trade therein. There can be no doubt that an action will lie against him for that. It is true, the word “goodwill” is not found in the agreement which was drawn up embodying the terms of the contract between the parties. There could be no difficulty in *framing a declaration which would be unobjec- [*290 tionable upon this contract. I incline to think this declaration good as it now stands. But, at all events, the case is one in which the court has power to amend, and in which we ought, if it were necessary, to exercise it.

The rest of the court concurring,

Rule absolute.

MOAKES v. NICOLSON. *May 31.*

1. Coals were sold at Hull, and shipped on board a vessel chartered by the buyer, to be paid for in cash against bill of lading in the hands of the seller's agent in London:—Held, that no property passed to the buyer until the condition was fulfilled, and that, the price being unpaid, the seller was entitled to intercept the delivery.

2. Held, also, that a third person, who had agreed with the vendee to purchase the coals of him, by a verbal contract entered into before the quantity was ascertained and shipped, could be in no better position than the original vendee.

THIS was an action of trover. The declaration stated that the defendant converted to his own use and wrongfully deprived the plaintiff of the possession of his goods, to wit, coals, and thereby the plaintiff was hindered and prevented from performing a contract which he had made with a certain firm trading under the style of Daniel Barker & Co. for the delivery to them of the said coals for a certain price: and the plaintiff, being unable by reason of the premises to deliver the said coals to the said Daniel Barker & Co., had become and was liable to make the said Daniel Barker & Co. compensation for the plaintiff's breach of the said contract; and the plaintiff had lost all the profits which he would have made had he performed the same: Claim, 250*l.*

The defendant pleaded,—first, not guilty,—secondly, that the said goods were not, nor were nor was any of them, or any part thereof, the plaintiff's, as alleged. Issue thereon.

*291] *The cause was tried before Keating, J., at the first sitting at Westminster in Easter Term last. The facts were as follows:—The plaintiff is a coal-broker and ship-agent, and the defendant a ship and insurance-broker, both carrying on business in London. The action was brought to recover 129*l.* 18*s.* 6*d.*, the value of 170 tons, 8 cwt., of South Yorkshire steam-coal, which had been seized and converted by the defendant, acting as the agent of one Josse, of Grimsby, coal-agent, under the following circumstances:—

On the 9th of December, 1864, one Pope, a coal-merchant in London, who was then at Hull, agreed with Josse, then also at Hull, for the purchase of a cargo of steam-coal, to be shipped on board a screw steamship called *The Isle of Arran*, which had been chartered by Pope. The following is a copy of the charter-party:—

“Hull, December 9th, 1864.

“It is this day mutually agreed between R. T. Dails & Co., agents to the owners of the *Isle of Arran*, of 138 tons gross register, and 30 horse-power, or thereabouts, and F. Pope, coal-merchant, Limehouse, London, that the first-named party is to let, and the second-named party is to hire, the above-named steamship for the space of three calendar months, reckoning from the day on which she is delivered over to the charterer at Goole, 10th December, 1864, in a perfectly good and efficient state; and to be by charterer or assigns employed for the conveyance of lawful merchandise, as follows,—Between good and safe ports on the east coast of England, not north of Newcastle or Warkworth Harbour: it being agreed that no salt or other injurious cargoes affecting iron vessels be shipped. And in consideration of these premises, it is agreed that the said owner shall receive from

F. Pope as charterer, for the hire and service of the said *steam-ship, at the rate of 50*l.* for every fourteen days, which pay [*292 shall commence from such day on which the steamer be placed at the charterer's disposal as above, and be made in the following manner,—every fourteen days in advance, in cash; the first fourteen days' hire to be paid in cash on signing this charter. And it is hereby agreed between the contracting parties, that the charterer is to find the crew and engineers, pay their wages, victualling. The charterer will have to find coals, oils, tallow, and waste, port-charges and pilotage, labourage loading and discharging, light and dock dues, and all expenses appertaining to the cargo he may put on board. The owners are bound to keep the vessel and engines in perfect order during the period in which she is employed by the charterer: but, if any damage should occur either to the ship or machinery, which may occupy more than forty-eight hours to repair, the time so occupied will be allowed by the owner in due proportion to the charter money stipulated; and the captain and engineer's certificate jointly shall be satisfactory evidence as to the time occupied in repairing; but, should the vessel be driven into port or to an anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterer's risk and expense. If the vessel should either be delivered or occupied by the charterer three days previous to or after the expiration of the stipulated period, such time to be allowed for at the rate of hire above named. The acts of God, Queen's enemies, fire, and all and every other danger and accidents of machinery, or of the seas, rivers, or navigation, of whatever nature and kind, always excepted. Should any difference of opinion arise between the parties to this contract, either in principle or detail, the same to be referred to arbitration to two competent parties, one to *be chosen by [*293 each contracting party, with power to call in a third person as referee; the majority of opinions hereafter to be final and binding. The owner to have a lien upon all freight and cargo for any hire that may be in arrear. And, in the event of the said hire not being paid as above, it is agreed that the owners or their agents shall have the power of taking possession of the said steamer and terminating this charter-party, but still holding the charterers liable for the said hire of 50*l.* for every fourteen days. Penalty for non-performance of this charter, estimated damages. It is further agreed that the usual commission of 5 per cent. on this charter-party is due by the owners to R. T. Dails & Co., on signing hereof. The captain and engineers to be appointed by the owners or their agent, but to be paid by the charterer at current wages. R. B. DAILS & Co."

The Isle of Arran proceeded to Grimsby, and was loaded by Josse with the coals in question; and on the 20th of December Pope received in London the following letter, invoice, and bill of lading:—

"Anglo French Transit Company,

"Royal Dock Chamber, Grimsby.

"19th December, 1864.

"Dear Sir,—The Isle of Arran is loaded, and will sail during the night. I shall telegraph you her sailing in the morning. I enclose copy of the account, 23*l.* 8*s.* 3*d.* expenses, and 93*l.* 15*s.* 11*d.* amount of invoice. H. JOSSE."

the cargo was unshipped by the defendant; whereupon this action was brought.

Josse swore that he sold the coals to Pope for cash against bill of lading, to be delivered by him in London. Pope, who was called as a witness on behalf of the plaintiff, swore that the sale was at a credit of thirty days: but, on his cross-examination, he admitted that he had not paid any part of the money, and that he was on the eve of bankruptcy.

On the part of the plaintiff it was contended that the coals having been delivered on board a vessel chartered by the buyer, the property thereby passed to him, and that the transit was at an end on the arrival of the vessel at Gravesend.

On the other hand, it was submitted, that, regard *being had [*296 to the terms of the contract, no property would pass to Pope until the arrival of the cargo at Gravesend and payment of the price; and that the shipment of the coals on board the Isle of Arran, though chartered by him, (a) was not a delivery to Pope, so as to vest the coals in him as owner.

It was left to the jury to say what were the terms of the contract. They found that the sale was for cash against bill of lading in the hands of the seller's agent in London.

A verdict was thereupon, by the direction of the learned judge, entered for the plaintiff for 136*l.* 8*s.*, leave being reserved to the defendant to move.

Hawkins, Q. C., accordingly, in Easter Term last, obtained a rule nisi to enter a verdict for the defendant, on the grounds, that, upon the facts admitted and proved, the defendant was entitled to the verdict, that the defendant had a right to stop the coals in transitu, and that neither Pope nor the plaintiff had any right to the property and possession of the coals at any time before this action was brought.

Keane, Q. C., and *Barnard*, now showed cause.—There was a complete delivery of the coals to Pope when they were delivered on board the vessel chartered by him. The Isle of Arran was demised to Pope: the transit therefore was at an end when the coals were shipped. The property and the possession had both passed, and the vendor could have no right to intercept them. [WILLES, J.—The coals were delivered subject to a condition that the property was not to pass until payment.] The answer to that is, that they were delivered on board the buyer's vessel, to one who was the buyer's servant, the document of title *being made out in his name. [WILLES, J.—They were [*297 put on board under a contract made under such circumstances that it was no contract at all.] The vendor might, no doubt, as in *Turner v. The Trustees of the Liverpool Docks*, 6 Exch. 543, have so framed the bill of lading as to reserve to himself the *jus disponendi*; but he has not taken that precaution. In *Joyce v. Swann*, 17 C. B. 84, it was held, that, where from all the facts it may fairly be inferred that it was the intention of the seller to pass the property in goods shipped to order, the mere circumstance of the bill of lading being taken in the name of the seller, and remaining unendorsed, will not prevent its passing. Here, every act of the seller is inconsistent with what the defendant now contends. [WILLES, J.—*Joyce v. Swann*

(a) See *Falk v. Fletcher*, 19 C. B. N. S. 403 (E. C. L. R. vol. 114).

hardly touches this case. Here, the goods were absolutely delivered to the buyer, and vested in him, unless the words "payment against bill of lading in the hands of my agent in London" created a condition subsequent, by which in default of payment the coals were to re-vest in the seller.] There is nothing here, it is submitted, which could amount to a condition subsequent. It would be manifestly unjust to allow the defendant, who has put Pope in a position to pass himself off as the true owner of the coals, to turn round and claim them against a *bonâ fide* purchaser from Pope.

J. A. Russell, and *Thesiger*, in support of the rule.—The contract under which the coals were put on board the Isle of Arran, was, that they should be paid for in cash against the bill of lading; and the only bill of lading now in question is that which was retained by the seller and transmitted to his agent in order to get the cash in pursuance of the terms of that contract. The result is, either that the *298] property in the coals *never vested in Pope at all, or vested only subject to the condition that it should re-vest in the seller on non-performance of the condition. Until Pope obtained the stamped bill of lading, he could acquire no property at all. The finding of the jury concludes the matter. If the plaintiff chose to deal with Pope in the absence of the only document that could give him title, he must take the consequences. He cannot be in any better position in regard to title than Pope himself stood in. In the cases relied on for the plaintiff, the bill of lading had been handed over; here it was retained. [ERLE, C. J.—The plaintiff bought without a bill of lading?] He bought on the 12th of December. The bill of lading was dated the 19th. Whether or not the property vests in the buyer in all cases depends upon the terms of the contract: see *Wilmshurst v. Bowker*, 2 M. & G. 792 (E. C. L. R. vol. 40), 3 Scott N. R. 272 (in error, 7 M. & G. 882 (E. C. L. R. vol. 49), 8 Scott N. R. 571); *Brandt v. Bowlby*, 2 B. & Ad. 932 (E. C. L. R. vol. 22); *Browne v. Hare*, 4 Hurlst. & N. 822; *Blackburn's Contract of Sale* 135. Here, the terms of the contract clearly negative the passing of any property until the price was paid and the bill of lading handed over. [WILLES, J., referred to *Smith's Mercantile Law*, 5th edit. 464 et seq., where the authorities are discussed.]

ERLE, C. J.—I am of opinion that the rule to enter the verdict for the defendant should be made absolute. Moakes brings his action on the ground that the property in the cargo of coals seized by the defendant belonged to him. It appears that the coals were sold by Josse to Pope, and by Pope to Moakes. One material question is, whether Moakes could have any better title to the coals than Pope had. I think not. That is undoubtedly not clear as a general proposition; because, if Josse had so dealt with Pope as to put him *299] *in the position of an ostensible owner, by intrusting him with the documents of title, it might be that Moakes might have acquired a title to the coals though his vendor Pope had none. But no such point can arise here, because by the terms of the contract it was distinctly understood between Josse and Pope that the property in the coals was only to vest in the latter upon the payment by him of cash against the bill of lading; and this condition never was complied with. This being so, whilst the coals remained an

unascertained quantity, Moakes enters into a contract with Pope, under which in my opinion he took precisely the same title as Pope had as between him and Josse. The sole question therefore is, what was the intention of the parties? The property could not pass out of Josse unless there was a sale by him with the intention that the property should pass to the vendee. Now, it was clearly the intention of Josse,—and the jury have so found,—to retain the property until his agent in London should receive the cash against the bill of lading. If that was the clear intention of Josse, the property did not pass. That this was the contract, is clear from the correspondence. The delivery of the coals on board a ship chartered by Pope has no effect whatever in passing the property. If the intention was that the ship should be regarded as the warehouse of Josse until the happening of the event contemplated, viz. the payment of the price, the putting the coals on board did not alter the position of the contracting parties. At the time Moakes made his contract with Pope, there had been no delivery, and no bill of lading existed. He therefore cannot say that he was misled by Pope's being permitted to hold himself out as the true owner. Upon the whole, therefore, I think no property passed to Pope, and that the now plaintiff cannot be in a better position than Pope.

*BYLES, J.(a)—I am of the same opinion. I must confess I had at first entertained some doubt, because I thought the sale [*300 to the plaintiff took place after the shipment and after the bill of lading had been handed to Pope. But it turns out that that is not so. The coals in question were not loaded, nor even distinguished from the rest of the coals in the vendor's yard. It is plain, therefore, that no property passed at the time of the sale. And it would seem from the cases cited that none passed at the time of the shipment. The putting the coals on board the Isle of Arran was clearly not intended by the parties to be a delivery so as to vest the property in the vendee. According to the evidence and the finding of the jury, the captain was a sort of supercargo; the goods were not to become the property of Pope until the conditions of the contract were satisfied. Apart from the representations of the vendor, therefore, it is plain that the plaintiff could have no property in the coals. The case appears to me to be perfectly clear and free from doubt.

KEATING, J.—I am of the same opinion. The course adopted by the vendor to retain the property in the coals and the control over them, was undoubtedly somewhat slovenly and unbusiness-like. But that his intention was that the property in the coals should not pass to the vendee until payment, is clear beyond all question. The finding upon that is quite in accordance with the evidence. That being so, nothing which took place afterwards has at all altered the rights of any of the parties. I characterize the proceeding as slovenly and unbusiness-like, because circumstances might have occurred which might have placed the vendor in a precarious position as to the *property in the coals; for, though he may have supposed he [*301 amply secured himself by stamping only one of the bills of lading and retaining that one in his own possession, yet, if the unstamped bill of lading which was transmitted to Pope had been

(a) Willes, J., had gone to Chambers.

produced to the plaintiff at the time he bought the cargo, and the plaintiff had acted upon it, a question would have arisen which might have placed the defendant's right in some jeopardy. But, at the time the plaintiff bought and paid for the coals, the subject-matter of the contract had not been ascertained. Rule absolute.

M'CALL v. TAYLOR. May 27.

Held, that an instrument in following form,—“Four months after date pay to my order the sum of three hundred pounds, for value received,” addressed to and formally accepted by the defendant, but having no date and no drawer's name,—was neither a bill of exchange nor a promissory note.

THIS was an action upon an instrument in the following form, which was declared on as a bill of exchange and also as a promissory note:—

“£300. 0. 0

[No date.]

“Four months after date, pay to my order the sum of Three hundred pounds, for value received.

“To Captain Taylor,

[No drawer's name.]

“Ship Jasper.”

Across this document was written, in the handwriting of the defendant, the words “Accepted, William Taylor.”

There was also a count for goods sold and delivered, and the ordinary pleas.

The cause was tried before Byles, J., at the sittings at Guildhall after the last Hilary Term. The plaintiff was a ship-chandler and provision-merchant. The defendant was the captain (and it was suggested owner *also) of the ship Jasper. It appeared that the *302] plaintiff had, in September, 1862, pursuant to orders received through one Milne, the ship's broker, delivered goods to the amount of 299*l.* 19*s.* 2*d.* on board that vessel for San Francisco, and had received in payment a bill at six months accepted by one Bailey, which bill was not paid at maturity; and that the instrument declared on was given to the plaintiff by Milne about six months afterwards. It also appeared that Bailey had been debited for the goods in the plaintiff's books, and that an invoice had been delivered charging Bailey as the debtor. There was no evidence whatever to show that the defendant had any interest in the goods.

The learned Judge intimating a pretty strong opinion that the instrument in question was not a bill of exchange, it was submitted for the plaintiff that it was a promissory note, for which reliance was placed on *Cruchley v. Clarence*, 2 M. & Selw. 90.

On the part of the defendant it was insisted that the instrument declared on was not a bill of exchange, being wanting in that which is essential to constitute a bill of exchange, viz., a drawer and a payee: and, further, that it was not either in form or in substance a promissory note,—referring to *Stoessiger v. The South Eastern Railway Company*, 3 Ellis & B. 549 (E. C. L. R. vol. 77), 23 Law J. Q. B. 293.

Upon the count for goods sold and delivered, the learned Judge left it to the jury to say upon whose credit the goods were delivered on

board the *Jasper*,—that of the defendant, or of Bailey,—reserving for the court the question whether the instrument could properly be declared on either as a bill of exchange or as a promissory note. The jury returned a verdict for the defendant.^(a)

**Hannen*, in Easter Term last, pursuant to the leave reserved, obtained a rule nisi to enter a verdict for the plaintiff, [*303 on the ground that the document declared on was a promissory note. He referred to *Cruchley v. Clarence*, 2 M. & Selw. 90, and *Armfield v. Allport*, 27 Law J. Exch. 42. He submitted, that, though informal, it might, like a document drawn in favour of a fictitious payee, be treated as a promissory note payable to bearer.

Day now showed cause.—The goods for which the instrument was given were not delivered to the defendant, but to another person; and the plaintiff's journal and ledger, and also the invoice delivered of the goods, all showed that the defendant was not the person to be charged: there is no reason, therefore, why the court should exercise any astuteness in favour of the plaintiff. The simple question is, whether the instrument amounts to a promissory note. It is submitted that it clearly does not. So far as it professes anything, it professes to be a bill of exchange wanting the name of a drawer. It is addressed to the defendant, and is accepted by him. The words "pay to my order" cannot mean the order of the defendant. In truth, it is an incomplete bill of exchange, and nothing else. The defendant does not promise to pay any sum on the demand of any person, or at any particular *time: and there is no endorsement. [WILLES, J.— [*304 The document seems sufficiently to explain itself. It is an authority to some person to put his name to it as drawer. No one has done so. It is therefore not a complete instrument. BYLES, J.— My strong impression at the trial was, that it was neither bill of exchange nor note: but I thought it better to reserve the point.] *Stoessiger v. The Great Eastern Railway Company*, 3 Ellis & B. 549 (E. C. L. R. vol. 77), 23 Law J. Q. B. 293, is precisely in point. There, a parcel delivered to a railway company for carriage contained 9*l.* 10*s.* in cash, and an instrument bearing a bill of exchange stamp, in the following terms,—“Three months after date pay to me the sum of 11*l.* 10*s.*, value received. To Mr. Cruttenden,” &c.: and written across it was an acceptance by Cruttenden. The parcel was addressed to Goold, a creditor of Cruttenden; and the intention was that Goold should put his name to the instrument as drawer. In the course of transmission the parcel was opened, and the instrument and the money it contained were abstracted. In an action against the company for the loss, it was held that the instrument was a “writing,” and not a “bill, note, or security for money,” within the meaning of the Carriers Act, 11 G. 4 & 1 W. 4, c. 68, s. 1; but that it could not be considered of value, so as under that section to exempt the com-

(a) In the course of the discussion at the trial, the learned judge adverted to a case in this court, the name of which he could not at the moment remember. It was probably *Brown v. De Winton*, 6 C. B. 336 (E. C. L. R. vol. 60). It was there held, that, although no precise form of words is necessary to constitute a promissory note, still it ought to have all the essentials of a contract. Thus, a note payable to the maker's own order, is not per se a negotiable instrument within the 3 & 4 Anne, c. 9, s. 1; a payee must be expressly named, or must appear by necessary implication. But, when a note in that form is endorsed in blank, and put in circulation by the maker, it becomes in effect payable to the bearer.

pany from their common-law liability as carriers. Lord Campbell, in giving judgment, says: "I am clearly of opinion that it is not a bill of exchange, for it has neither drawer nor payee; and it is not a promissory note, because it does not contain a promise to pay any one, and it is entirely inconsistent with Cruttenden's intention that any person who got possession of it should put his name to it as drawer." The rest of the court agree that the instrument was neither bill nor note: and Erle, J., says,—*"This was an instrument in an*
 *305] *imperfect state."* *It is utterly impossible to distinguish that from the present case.

Hannen, in support of the rule.—Though imperfect as a bill of exchange, this instrument may well have effect given to it as a promissory note, as it must have been intended by the party to be, viz. an engagement to pay the amount to a bonâ fide holder on demand. The plaintiff might have put his name to it as drawer; and, if he had done so, the defendant would have had no answer. That is clear from *Cruchley v. Clarence*, 2 M. & Selw. 90, *Crutchley v. Mann*, 5 Taunt. 529 (E. C. L. R. vol. 1), 1 Marsh. 29 (E. C. L. R. vol. 4), and numerous other cases. It is the same thing, as Le Blanc, J., observes in the former case, as if the defendant (the acceptor) had made the bill payable to bearer. [BYLES, J.—What was wanting in *Cruchley v. Clarence* is present here: the marginal note is equivocal.] The name of the person sued is there: and it is held that he gives authority to any one who is a bonâ fide holder, to fill up the blank. "As the defendant has chosen," says Lord Ellenborough, "to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant, by leaving the blank, undertook to be answerable for it when filled up in the shape of a bill." It is upon the same principle that a bill drawn in favour of a fictitious payee may be declared on as a bill payable to bearer. In *Fielder v. Marshall*, 9 C. B. N. S. 606 (E. C. L. R. vol. 99), an instrument purporting on the face of it to be a bill of exchange drawn by A., payable to the plaintiff or order, was accepted by B., and handed to the plaintiff in satisfaction of a claim for rent due to her from A. In the place where the direction to the drawee is usually found, the name and address of the payee were inserted. The whole instrument (except the drawer's name) was in
 *306] the handwriting of B. It *was held that the payee was entitled to recover upon it as the promissory note of B. [BYLES, J.—The address in the corner was treated as no address at all. The instrument could not be a bill of exchange. It could only be Marshall's promissory note. The court construed it so as to give effect to the obvious intention of the parties. MONTAGUE SMITH, J.—There were both maker and payee named there.] There cannot be any difference in principle between a blank left for the name of a drawer, and a blank for the payee, or, which is the same thing, a fictitious payee. Erle, C. J., in that case says: "It appears to me that the right way to deal with it is this, to treat the direction to 'Mrs. Emma Fielder' at the foot of the bill as a mere informal repetition of the words in the body of it, 'pay to Mrs. Emma Fielder.' The effect of so construing it is, that the defendant, who accepts the bill (?), thereby promises to pay the amount at maturity to Emma Fielder. Feeling that we are at liberty so to construe the instrument, I have much

satisfaction in giving effect to what must have been the intention of the parties, by holding that the plaintiff is entitled to recover." In the course of the argument, Willes, J., referred to a case of *Miller v. Thompson*, 3 M. & G. 576 (E. C. L. R. vol. 42), 4 Scott N. R. 204, where it was held that an instrument in the form of a bill of exchange, drawn upon a joint-stock bank by the manager of one of its branch banks, by order of the directors, might be declared upon as a promissory note; Tindal, C. J., in giving judgment, saying,—“It appears that the directors for whom the instrument in question purports to be drawn by their manager, are members of the company whose name and character are presented on the face of it, and that the company is not a corporation, but a mere private association. We must, therefore, look upon it as an instrument drawn by one of several *mem- [*307
bers of a firm, purporting that the sum therein mentioned shall be paid by the firm at a given time and place. In effect it is a promissory note, and nothing else. To constitute a bill of exchange, it is essential that there should be two parties, a drawer, and a person upon whom the bill is drawn.(a) I am clearly of opinion that this is a promissory note.” And the learned judge (Willes, J.) adds, “If there be sufficient on the face of the instrument to indicate a promise to pay, it is a promissory note.” In *Peto v. Reynolds*, 9 Exch. 410, the plaintiff’s agent at Cameroons, in Africa, drew an instrument in the form of a bill of exchange, but addressed to no one; across which the defendant’s agent wrote an acceptance in the defendant’s name, and delivered the bill to the plaintiff’s agent, for value received. In an action on the bill, the plaintiff attempted to prove that the bill was presented to the defendant, when he promised to pay it. It being doubtful, however, from the evidence whether the defendant had made an absolute or merely a conditional promise to pay the bill, the court, in granting a new trial, though disposed to think that the instrument was not a bill of exchange, declined to give an express opinion on the point; but it was held by Parke, B., Alderson, B., and Martin, B., that, if the instrument was not a bill of exchange, *it was clearly a promissory note*, if there was evidence of an absolute promise to pay it. In *Armfield v. Allport*, 27 Law J., Exch. 42, the circumstances were very similar to those of the present case. It was there held that an instrument drawn in the form of a bill payable to bearer, even if accepted in blank, and afterwards filled up by the drawer, may be declared on by the endorsee as a promissory note made by the drawer and endorsed by *the drawee.(b) In *Byles on Bills*, 8th edit. [*308
73, it is said: “If the bill be not made payable either to any payee in particular, or to the drawer’s order, or to bearer in general, it would seem, according to the opinion of the majority of the judges (in *Minet v. Gibson*, 1 H. Bl. 608), to be payable to bearer; but, according to the opinion of Eyre, C. J., in the same case, it is mere waste paper:” and reference is made to *Rex v. Randall*, Russ. C. C.

(a) And a person to whom the money is to be paid?

(b) It is not easy to discover what was decided by this case. In a considered judgment, the Lord Chief Baron is reported to have said: “A man who writes his name across a stamped paper as acceptor, there being a direction to him upon the paper, is liable; he gives his authority to anybody to draw upon him when it may be convenient to do so, or when the person to whom the paper is given may think it advisable to apply it for this purpose.”

185, where a bill payable to — or order was held not to be a bill of exchange, because there was no payee; and to *Rex v. Richards*, R. & R. C. C. 193, where the prisoner drew a bill upon the treasurer of the navy payable to — or order, and signed it in the name of a navy surgeon, and it was held, that, to constitute an order for payment of money, there must be some payee, and that a direction to pay to — or order was not sufficient.

ERLE, C. J.—I am of opinion that this rule should be discharged. The instrument in question is declared upon as a bill of exchange and also as a promissory note. It was in this form,—“Four months after date, pay to my order the sum of three hundred pounds, for value received,” and it was addressed to the defendant, but it had no date and no drawer's name. Across it was written an acceptance by the defendant. The question is, whether the holder of this document has *309] a right to declare on it either as a bill of exchange or as a promissory note. It is clearly not a bill of exchange; and in form it is not a promissory note. If I could be clearly satisfied that I should be giving effect to the intention of the parties by holding this instrument to be a promissory note, I would endeavour so to construe it. But I am aware of no case, and the industry of the learned counsel has discovered none, which warrants us in holding this to be either the one or the other. It is an inchoate and imperfect instrument. If the holder had authority to make it a complete instrument either as a bill or a note, he was at liberty to do so; but, if he had no such authority, he might if he attempted to do so render himself liable to a charge of forgery. The case of *Stoessiger v. The South Eastern Railway Company*, 3 Ellis & B. 549 (E. C. L. R. vol. 77), 23 Law J., Q. B. 293, seems to me to be precisely in point, without going into any of the other cases. Nothing is clearer to my mind than that, in the ordinary case of an acceptance with the drawer's name in blank, it is important, in order to constitute a contract, that it should be known who is to be the drawer. It may have been important here that the instrument should be filled up as a bill drawn by the owner of the ship or the broker upon the captain. And it may be that the plaintiff had no authority to add his name as the drawer. But, whatever may have been the particular circumstances under which this document was given, I act upon the case I have referred to. As it stands, the thing is inchoate and incomplete, and affords no foundation for the holder to sue upon it.

WILLES, J.—I am entirely of the same opinion.

BYLES, J.—I am of the same opinion. I thought at the trial, and still think, that the instrument in question could not be declared on *310] either as a bill of exchange or as a promissory note. It is not like a bill accepted in blank.

MONTAGUE SMITH, J.—I also think this case is not distinguishable from *Stoessiger v. The South Eastern Railway Company*. There, upon an instrument precisely similar to this, except that there it was dated, Lord Campbell says: “It is not a bill of exchange; there is neither drawer nor payee. Nor is it a promissory note to pay any one who might happen to be the bearer: that Cruttenden should become liable generally to the bearer, was quite contrary to his intention.” So here, I think we should be going entirely against the

intention of the defendant if we were to hold him liable upon this instrument as upon a promissory note payable to bearer.

Rule discharged.

HURST v. THE GREAT WESTERN RAILWAY COMPANY.

June 10.

The mere taking of a ticket for a journey by railway does not amount to a contract on the part of the railway company, or impose upon them a duty, to have a train ready to start at the time at which the passenger is led to expect it.

THIS was an action in which the plaintiff sought to recover a compensation in damages for delay and detention on a railway journey.

The first count of the declaration stated that the defendants were carriers of passengers by railway from Cardiff to Newcastle-upon-Tyne for reward to the defendants in that behalf, that the plaintiff was received by the defendants as a passenger to be carried on their railway, and ought to have been conveyed by them by a certain train or series of trains, without any unreasonable delay, from Cardiff to Newcastle-upon-Tyne; and alleged for breach that the defendants made *default in so carrying and conveying him, and that the plaintiff was thereby detained at Gloucester for twenty-four [*311 hours, and was not conveyed to and did not arrive at Newcastle aforesaid until twenty-four hours after a reasonable time for carrying him there had elapsed; whereby the plaintiff incurred hotel expenses, suffered inconvenience from exposure and cold, was put to expense in sending telegrams to his family, and neglected his business, &c.

The second count stated that the plaintiff was received by the defendants as a passenger to be by them carried from Cardiff to Gloucester within a reasonable time, and on the terms, amongst others, that the defendants would use all reasonable care to convey the plaintiff to Gloucester within a certain fixed time, and in time for the plaintiff to go from Gloucester to Newcastle-upon-Tyne by a certain other train about to start from Gloucester to Newcastle-upon-Tyne within a reasonable time after the said certain fixed time; and alleged for breach that the defendants did not carry the plaintiff to Gloucester within such reasonable time, and that the plaintiff did not arrive at Gloucester until after the departure of the train from Gloucester to Newcastle, whereby the plaintiff was detained at Gloucester for twenty-four hours, &c. Claim 200*l*.

The defendants pleaded to the first count,—1. a traverse of their being such common carriers as alleged,—2. a traverse of the plaintiff's being such passenger to be conveyed within such time as alleged,—thirdly, not guilty. There were similar pleas to the second count. Issue.

The cause was tried before Mellor, J., at the last Spring Assizes for the county of Northumberland. The plaintiff was a mining engineer at Durham. On Saturday, the 17th of December last, he went to the defendants' station at Cardiff, for the purpose of proceeding to Newcastle by a train from Milford which *should arrive at Cardiff [*312 at 4.34 P. M., proceeding thence to Gloucester, where it joins the

mail-train from Bristol, and passes thence through Birmingham and Derby to Newcastle, arriving there at 8 o'clock on the following morning. At the Cardiff station, he inquired of the clerk in the booking-office if he could book to Newcastle by the train which was then about due, and was told that he could. He thereupon took a ticket upon which was printed the following words,—“Great Western Railway. Cardiff to Newcastle, viâ Midland Railway. First Class.” Nothing was then said about the train being delayed: but the plaintiff was afterwards informed by one of the officials at the station that the Milford train had broken down at Swansea; and it did not arrive until 6 o'clock. The mail-train for Birmingham leaves Gloucester at 8.17; and the Milford train was due at Gloucester at 7.5: it did not, however, arrive at Gloucester until 8.45, when the corresponding train had already started. The plaintiff was consequently obliged to wait until the following day. In the mean time he telegraphed to his family at an expense of 8s. Not choosing to remain at Gloucester, the plaintiff and a friend proceeded to Cheltenham, which is about seven miles on the road, where they stayed at an hotel, joining the mail-train on the following evening, and arriving at Newcastle at about 8 o'clock on the Monday morning. The expenses incurred by the plaintiff at the hotel at Cheltenham amounted to 30s.

The plaintiff claimed 17. 18s. for his hotel bill and telegram, 10l. 10s. for the loss of a day, and also damages for the annoyance and inconvenience of being detained from his home on the Sunday, catching a cold, &c.

Some correspondence took place between the plaintiff and the secretary and the solicitor of the company, *which evinced a
*313] desire on the part of the company to meet the plaintiff's grievance fairly, but at the same time repudiated his legal right to compensation, and referred to the time-bills, in which it was expressly stated that the company did not guarantee the arrival or departure of the trains at the exact times stated therein, but that they would do their best to insure punctuality. *The time-bills were not put in.*

On the part of the defendants, it was submitted that there was no case to go to the jury, there being no *contract* on the part of the company by the ticket that a train should arrive so as to meet a corresponding train.

The learned judge declined to nonsuit the plaintiff, but reserved leave to the defendants to move to enter a nonsuit if the court should be of opinion that there was no evidence to go to the jury. And in his summing-up he told the jury that the contract proved was simply to carry the plaintiff from Cardiff to Newcastle, viâ the Midland Railway; that, upon that contract, the defendants were bound to carry the plaintiff to Newcastle within a reasonable time, and if there was any justification or excuse it should come from them; and that, if there was unreasonable delay, they were liable to the extent of the consequences naturally arising therefrom,—for the expenses at the hotel, and the telegram, for the loss of a day if the jury thought that resulted from the plaintiff's arriving at Newcastle on Monday instead of Sunday morning, and also, if they thought fit, a reasonable sum for the inconvenience and discomfort arising from the twenty-four hours' detention at Cheltenham.

The jury returned a verdict for the plaintiff, assessing the damages at 7*l.* 3*s.*, being 5*l.* 5*s.* for loss of time, and 1*l.* 18*s.* for the hotel expenses and the telegram.

E. James, Q. C., in Easter Term last, pursuant to the *leave reserved, obtained a rule nisi to enter a nonsuit, on the ground [*314 that there was no evidence of any cause of action, or for a new trial on the ground that the verdict was against the weight of evidence. [ERLE, C. J., observed that the question seemed to be whether expectation founded upon past experience could constitute a contract.]

Temple, Q. C., and *C. Crompton*, now showed cause.—The damages being under 20*l.*, the second breach of the rule cannot be sustained. The only question therefore will be, whether there was any evidence to go to the jury of a breach of contract or a breach of duty on the part of the defendants. The contract was, to carry the plaintiff from Cardiff to Gloucester in time to meet the train there the same evening for Newcastle, or to carry him to Newcastle from Cardiff in a reasonable time,—which reasonable time was to be estimated by the usual course of travelling on that line. At Cardiff the plaintiff is told by the station-master that he can proceed through to Newcastle by a train which was due at Cardiff at 4.34 P. M. He accordingly took his ticket, and in due course should have reached Gloucester, at 7.5, in which case he would be in ample time for the train which left Gloucester at 8.17, and should have arrived at Newcastle early on the Sunday morning. In consequence, as the plaintiff learned from one of the company's servants at Cardiff, of a break down at Swansea, the train from Milford which should have reached Cardiff at 4.34, did not arrive until 6 at Cardiff, and did not reach Gloucester until long after the corresponding train had departed. In *Denton v. The Great Northern Railway Company*, 5 Ellis & B. 860 (E. C. L. R. vol. 85), the Great Northern Railway Company, whose line communicated with the line of the North Eastern Railway Company at Milford Junction, had *ar- [*315 rangements by which their trains starting from Peterborough at 7 P. M., and going to Milford Junction, there met a train of the North Eastern Company running from Milford Junction to Hull, by which passengers from Peterborough to Hull were forwarded. The Great Northern Company published monthly time-tables, in which they stated, in the usual way, that the 7 P. M. train from Peterborough carried to Hull. At the end of a month after the Great Northern time-tables for the ensuing month were prepared in this form and printed, but before they were published, the North Eastern Company discontinued the train from Milford Junction to Hull. The Great Northern Company made no alteration in their time-tables already printed, but published and circulated them after they knew that there was no such train. The plaintiff having seen one of the time-tables, made his arrangements, on the faith of it, to go from Peterborough to Hull by the 7 P. M. train. He came to Peterborough in time, went to the station, and then for the first time learned that he could go no further than Milford Junction by that train. He was delayed in his journey, and sustained damage, for which he sued the Great Northern Company. On a case stated, without pleadings, it was held that he was entitled to recover, on the ground that the circulation of the time-tables amounted to a representation on the part of the defendants that there was a

train, which was false to the knowledge of those making it, and calculated to induce the plaintiff to act as he did,—and, per Lord Campbell, C. J., and Wightman, J., to a contract on the part of the company with those who should come to the station, to forward them as stated in the time-table. In *Hamlin v. The Great Northern Railway Company*, 1 Hurlst. & N. 408, also, it was held that an action lay for a breach of the contract contained in the time-bill. [WILLES, J.—*316] Since *the case of *Denton v. The Great Northern Railway Company*, the railway companies have protected themselves by inserting a notice in their time-bills, to the effect that they do not guarantee the arrival or departure of the train at the exact time stated in the time-bill, but will do their best to insure punctuality.] They have not done so here: the ticket was the only contract; and by that the company undertook to convey the plaintiff to Newcastle at all events within a reasonable time. Was it reasonable to detain him until the Monday morning? [BYLES, J.—In *Denton v. The Great Northern Railway Company*, the complaint was that there was no train at all: here it is that the train was later than it ought according to the ordinary course to have been. You must go the length of contending that an action lies against the company every time a train is late, and any passenger sustains an injury therefrom. MONTAGUE SMITH, J.—Do the company warrant the punctual arrival of the trains?] They at all events warrant such an amount of punctuality as will enable a passenger to catch the particular train they profess to correspond with. [WILLES, J.—I must confess I am at a loss to discover such a contract upon the face of the ticket.] The contract is proved by the ticket, coupled with the representation of the company's servant that the plaintiff could book to Newcastle by the train about to start. [WILLES, J.—The time-table would have shown what the real contract was: and that the plaintiff did not produce.] The learned judge told the jury that they could not take notice of the time-bills, the defendants not having put them in or proved knowledge of them on the part of the plaintiff, and that the only contract was that contained in the ticket. Whether or not the journey was performed within a reasonable time, was purely a question for the jury: and they have found that it was not.

*317] **E. James*, Q. C., and *T. Jones*, were not called upon to support the rule.

ERLE, C. J.—I am of opinion that this rule should be made absolute to enter a nonsuit. I think there was no evidence of any breach of duty or breach of contract on the part of the company. The whole substance of the plaintiff's case, is, that he took a ticket at Cardiff, to be carried by the Great Eastern Railway Company to Newcastle-upon-Tyne, via the Midland Railway; and the grievance is, that the train from Milford by which he was to proceed on that journey, instead of arriving at Cardiff so as to start at its accustomed time, 4.34 P. M., did not reach Cardiff until 6 o'clock, and in consequence passengers wishing to go through to Newcastle missed the corresponding train at Gloucester, and could not be carried on until the evening of the next day. The substance of the complaint therefore is, that the company were guilty of a breach of duty or a breach of contract, because the Milford train arrived at Cardiff an hour and

a half behind its usual time. I am of opinion that the mere taking of a ticket does not amount to a contract on the part of a railway company, or impose upon them a duty, to have a train ready to start at the time at which the passenger is led to expect it: and, in order to maintain an action, it is incumbent on the plaintiff to show either a breach of contract or a breach of some legal duty. If there were any such contract here, it would appear from the time-bills published by the company: and if the plaintiff (whose duty it was to do so) had put in the time-bill, we should have seen what the real contract was, viz., that the company do not warrant that their trains shall arrive with punctuality at the times indicated at the different stations. There clearly was nothing like a special contract in *the talk with the officials on the platform at Cardiff. A mere casual conversa- [*318 tion with a person whose duty it is to open and shut the carriage doors or the like cannot amount to evidence of a special contract with the company. And even that conversation here merely amounted to this,—"The train is behind time; and we hear that there has been a breakdown at Swansea." It is perfectly consistent with all the evidence here that the company have done all they contracted to do. When a plaintiff complains of a breach of duty, he is bound to produce reasonable evidence to show that there has been such a breach of duty. Notwithstanding the able argument we have heard to-day, I can see no such evidence, and therefore feel bound to give my judgment in favour of the company.

WILLES, J.—I am of the same opinion. The reason why the plaintiff sustained the damage he complains of, is, that the train by which he should have proceeded did not arrive at Cardiff at the time it was expected to arrive, and consequently did not depart from Cardiff so as to arrive at Gloucester in time for the plaintiff to transfer himself at that place to the train which would have carried him on that evening to Newcastle. The question therefore is, whether the company entered into any contract with the plaintiff, or were under any legal duty to have a train at Cardiff ready to start at such time as would have enabled the plaintiff to go on by the corresponding train from Gloucester to Newcastle. That depends upon the effect which is to be given to two facts. The first is, that the plaintiff had taken a ticket for Newcastle. The second is, that, in the ordinary course of things, the train should have started from Cardiff at 4.34 P. M. As to the ticket, all that that indicates, is, that the plaintiff shall be carried from Cardiff to Newcastle by *the next train starting from Cardiff for Gloucester (where the defendants' line ends), [*319 and thence on by the next train starting from Gloucester for Newcastle at such time as it was possible to overtake it. It is simply a ticket for the plaintiff's conveyance from Cardiff to Newcastle. There is no statement on the face of it to show how he is to be taken there, except the words "via Midland Railway." Now, the law attaches to such a contract as this (assuming the ticket and the surrounding circumstances to amount to a contract), that it is to be performed within a reasonable time. The ticket, therefore, does not help the plaintiff. The only other circumstance to be considered, is, the evidence that the train should have started from Cardiff at 4.34, that is, that the ordinary time for the departure of that particular train was 4.34.

Whether the train was due at Cardiff in the sense that it was warranted to be there at that time, or as a mere representation that it was usually there at that time, depends upon the consideration of whether any duty was cast upon the company that the train should arrive punctually. Clearly there is no such duty cast upon the company by law: if any such duty exists, it must be proved by competent evidence. Reliance was placed upon the statement of the authorized agent of the company that the train would start at 4.34, and would carry the plaintiff through to Newcastle. The question is, whether that was a warranty, or only a representation coupled with a stipulation that the punctual arrival and departure of the train were not warranted by the company. That would appear from the time-bill; and I apprehend it was clearly for the plaintiff to give that in evidence. He should have proved it by the mode which as between the company and a passenger was held to be the proper mode of proof in *Denton* *320] *v. The Great Northern Railway Company*. If the time-bill had been produced here, there would probably have been an end of the plaintiff's case. It would, doubtless, have shown that there was an absolute repudiation of a warranty of punctuality. Upon the whole, I think the merits as well as the law are with the defendants.

BYLES, J.—I must confess I have arrived at the same conclusion, and that not without having had ample time for consideration. The case is one of considerable importance; for, it affects every ticket issued for a journey of any length. I see no evidence here of guarantee or absolute promise of correspondence with any other trains: and there is the best possible reason for saying there was none, for the plaintiff has not alleged it in his declaration. He states that he was received by the defendants as a passenger to be carried on their railway, and ought to have been conveyed by them by a certain train or series of trains, without any unreasonable delay, from Cardiff to Newcastle. It may be that that was proved. The only evidence which the plaintiff gave was the ticket. That contains no guarantee upon the face of it. At the utmost, it only proves a contract to carry the plaintiff from Cardiff to Newcastle without unreasonable delay. If the plaintiff wished to prove more, he should have produced the time-table. Possibly that might have proved his case. It is also possible, and indeed highly probable, that he had very good reasons for not producing it. The absence of that document, however, has left us in the dark. The foundation, therefore, upon which the plaintiff's case reposes is wanting. I cannot entertain any doubt whatever that the plaintiff ought to have been nonsuited.

*321] MONTAGUE SMITH, J.—I am entirely of the same *opinion. I see no evidence of any contract on the part of the company to carry the plaintiff from Cardiff to Newcastle within a reasonable time, simpliciter, but to carry him with reference to the usual course of the company as contained in their time-bills. There was no absolute contract to carry the plaintiff so as to meet a particular train at Gloucester; but at most a representation that in the ordinary course he might expect to meet it. If the correspondence were any evidence of the time-bills, it is clear that there was an express condition that the times of arrival and departure of the trains were not guaranteed. If the company did warrant the exact arrival and departure of every train,

of course no accident, however unforeseen, except the act of God, would be an answer. But it is quite clear that the company here contracted with reference to their time-bills: and they should have been produced.

Rule absolute to enter a nonsuit.

PHELPS v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY. *May 26.*

"Ordinary luggage," for which a railway company is responsible, does not include title-deeds belonging to a client which an attorney is carrying with him in his bag or portmanteau for the purpose of producing on a trial in a local court; or bank-notes (to a considerable amount) carried by him for the purpose of meeting the contingencies of the suit.

THIS was an action brought by the plaintiff, a solicitor, against the London and North Western Railway Company, to recover damages for the delay and expense he had sustained through the negligence of the defendants' servants on two several occasions where he *was a passenger on their line, in consequence of the temporary [*322 loss of his luggage.

The cause was tried before Byles, J., at the sittings in London after last Hilary Term. The facts were as follows:—The plaintiff was a solicitor at Lunsford, in Kent. In July, 1863, he was retained for the defendants in an action brought in the county court of Montgomeryshire holden at Machynlleth, and accordingly proceeded thither by the London and North Western Railway, taking with him a portmanteau, in which, besides his necessary clothing, he had certain deeds and writings belonging to his client, and which were essential to his defence in the proceedings in the county court, and 65*l.* in Bank of England notes, which he took for the purpose of paying money into court if that should be desirable, or of paying the amount of the judgment in the action if his client should be defeated. On his arrival at Shrewsbury, where it was necessary to change to another train, the plaintiff saw his portmanteau on the platform: but, when he reached his journey's end, the portmanteau was not to be found. Not being prepared to produce the deeds, he was compelled to apply to the judge to adjourn the cause, which was allowed on payment of costs. After remaining several days at Machynlleth in hopes of recovering the portmanteau, he was compelled to return to town without it. It was ultimately discovered at the lost luggage office, and restored to the plaintiff in safety.

In May, 1864, the plaintiff had occasion again to attend the same county court, touching the same matter, and was again a passenger by the defendants' line, taking with him the same deeds in a leather bag. On his arrival at Machynlleth, the leather bag was not to be found, and the plaintiff was in consequence again obliged to apply for an adjournment of the cause, which was granted upon the same terms as before.

*The plaintiff claimed compensation in this action for his [*323 loss of time, and tavern and other expenses on the first occasion, and the expenses he had incurred in consequence of the two

postponements of the trial, and also the expense of the two journeys which had thus been rendered abortive.

The defendants pleaded a plea founded upon the Carriers Act, 11 G. 4 & 1 W. 4, c. 68; and also a plea that the contents of the portmanteau and bag were not passengers' luggage within the meaning of the 66th section of their special act. (a)

The first plea was demurred to, on the ground that the Carriers Act applies only to the *loss* and not to damage resulting from the mere temporary detention of property. (b)

On the part of the defendants it was contended that the plaintiff was not entitled to carry as "ordinary luggage" deeds and Bank of England notes, and that the claim in respect of the fruitless journeys (or at all events so much thereof as related to his journeys from Lunsford) and the postponements of the trial was too remote, as not being in the nature of damages which could reasonably be supposed to have been in the contemplation of the parties at the time of entering into the contract.

*324] The learned judge thereupon left it to the jury to *say,—first, what damages the plaintiff had sustained, assuming that he was entitled to carry the deeds and bank-notes as personal luggage without paying for them,—secondly, what if he was not so entitled. The jury assessed the damages upon the first hypothesis at 44*l.* 1*s.*, and upon the second at 20*l.*

A verdict was entered for the plaintiff for 44*l.* 1*s.*, leave being reserved to the defendants to move to reduce it to 20*l.* or to such other sum as the court should think right.

Kemplay, in Easter Term last, accordingly obtained a rule nisi to reduce the verdict to 20*l.* or such other sum as the court should direct, on the grounds,—first, that the deeds, documents, and Bank of England notes were not the plaintiff's ordinary luggage which he was entitled to carry without paying for the same,—secondly, that the alleged loss of his journeys was too remote to be recoverable as damages against the defendants, and not such a damage or loss as the defendants could fairly and reasonably have contemplated.

Huddleston, Q. C., and *Prideaux*, now showed cause.—The question is what is a passenger's "ordinary luggage," within the meaning of the 66th section of the 9 & 10 Vict. c. cciv. That it is not confined to necessary clothing for the person, is plain. A barrister travelling on circuit might perhaps be allowed to carry his wig and gown, and possibly a No. of Reports; (c) a sportsman going to the moors, his gun; a medical man, his instruments and bandages; an artist, his box of colours and his easel. Why, then, should an attorney be precluded from carrying in the same way deeds and documents, and money to

(a) The 9 & 10 Vict. c. cciv., s. 66, enacts that "every passenger travelling upon the railway in a first-class carriage may take with him his *ordinary luggage* not exceeding 1 cwt., and every passenger travelling in a second-class carriage may take with him his ordinary luggage not exceeding 60lbs. weight, and every passenger travelling in a third-class carriage may take with him his ordinary luggage not exceeding 40lbs. weight, without any charge being made for the carriage."

(b) See *Hearn v. The London and South Western Railway Company*, 10 Exch. 783. This plea was ultimately abandoned.

(c) See *Munster v. The South Eastern Railway Company*, 4 C. B. N. S. 675 (E. C. L. R. vol. 93).

meet the exigencies of *the suit he is engaged in? It has been [325
 decided in this court that merchandise cannot be carried as per-
 sonal luggage: *Cahill v. The London and North Western Railway
 Company*, 10 C. B. N. S. 154 (E. C. L. R. vol. 100), in error 13 C. B.
 N. S. 818 (E. C. L. R. vol. 106). [WILLES, J.—The House of Lords
 have since decided the same way, upon an appeal from a decision of
 the Irish Court of Common Pleas, (a) without being made acquainted
 with our decision: *Belfast and Ballymena Railway Company v. Keys*,
 9 House of Lords Cases 556.] In *The Great Northern Railway Com-
 pany v. Shepherd*, 8 Exch. 38, it was held that a carrier of passengers
 for hire is at common law only bound to carry their personal luggage;
 and therefore if a passenger has merchandise among his personal lug-
 gage, or so packed that the carrier has no notice that it is merchandise,
 he is not responsible for its loss. Parke, B., there says that the term
 personal luggage “comprises clothing and such articles as a traveller
 usually carries with him for his personal convenience; perhaps even
 a small present, or a book for the journey, might be included in the
 term; but certainly not merchandise, or materials bought for the pur-
 pose of being manufactured and sold at a profit,”—citing Angell on
 Carriers, § 115; Story on Bailments 526, 5th edition, note. The
 definition given by Story, in § 499, is this: “By baggage, we are
 to understand such articles of necessity or personal convenience as
 are usually carried by passengers for their personal use, and
 not merchandise or other valuables, although carried in the trunks of
 passengers, which are not designed for any such use, but for other
 purposes, such as a sale, and the like.” The learned editor of the 7th
 edition of that valuable work adds to this section,—“But it has been
 said, that, although passenger *carriers are not liable for mer- [326
 chandise when packed up with a traveller’s baggage, if the
 baggage be lost; yet, if the merchandise be so packed as to be obvi-
 ously merchandise to the eye, and the carrier takes it without objec-
 tion, he is liable for the loss. The term baggage has been thought to
 include personal jewellery (*M’Gill v. Rowland*, 3 Barr Penn. 451; and
 see *Brooke v. Pickwick*, 4 Bingh. 218, 12 J. B. Moore 447; *Nevins v.
 Bay State Steamboat Company*, 4 Bosw. 226); a watch in a trunk,
 valued at 94 dollars (*Jones v. Vorhees*, 10 Ohio R. 145; but see
Bomar v. Maxwell, 9 Humph. R. 621); a set of carpenter’s tools, to a
 reasonable amount (*Porter v. Hildebrand*, 2 Harris Penn. R. 129); a
 pair of pistols (*Woods v. Devin*, 13 Ill. R. 746; *Davis v. The Southern
 Michigan Railway*, 22 Ill. R. 281); money in a trunk to a reasonable
 amount bonâ fide intended for travelling-expenses and personal use
 (*Jordan v. The Fall River Railroad Company*, 5 Cush. R. 70; *Illinois
 Central Railroad v. Copeland*, 24 Illinois 332: the sum of 439 dollars
 was thought to be an unreasonable sum in *Davis v. Michigan, &c.
 Railroad*, 22 Illinois 278); although on this point the decisions are
 not uniform: see *Grant v. Newton*, 1 E. D. Smith 95, where the con-
 trary is held: and see *Bomar v. Maxwell*, 9 Humphreys R. 621. But not
 large sums of money, such as are carried merely for transportation,
 and not for convenience on the way (*Orange County Bank v. Brown*,
 9 Wendell 85): nor articles of merchandise, not intended for personal
 use; such as, ‘thirty-eight pairs of new shoes, sixty pairs of stock for

(a) *Keys v. The Belfast and Ballymena Railway Company*, 8 Irish Com. L. Rep 167.

boys' shoes, and two papers of shoe-nails' (Collins v. Boston and Maine Railroad, 10 Cush. 506); nor for a box of jewellery carried as and for merchandise: Richards v. Westcott, 2 Bosw. 589." (a) As to the

(a) The learned editor (Edmund H. Bennett) adds in a note to this section,—“In Dibble v. Brown, 12 Geo. 217, Nisbett, J., said: ‘It remains, however, to inquire what is to be understood by baggage for which they are thus liable. And we are not guided in this inquiry by adjudications which settle a definite rule of universal application. From their usual course of business, when they carry a passenger, a contract is implied to carry also his baggage. They are presumed to be compensated in the fare for his transportation, and, I can very well believe, well compensated, because the amount of travel is greatly increased by the comfort and convenience of carrying baggage, and would be lessened, if for his baggage a passenger was required to pay freight. It is curious to remark, as I do en passant, that the law takes more care of a man’s luggage than it does of his life and limbs; for the former the carrier is liable as insurer against loss, except by the act of God and the public enemies; for the safety of the latter, he is bound only to extraordinary care and diligence. But, to return: to what articles, under the denomination of baggage, does this implied contract extend? Judge Story informs us that by baggage we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as a sale and the like:’ Story on Bailments, § 499. In Orange County Bank v. Brown, 9 Wendell 115, 116, Judge Nelson says ‘A reasonable amount of baggage, by custom or the courtesy of the carrier, is considered as included in the fare for the person: but courts ought not to permit this gratuity or custom to be abused, and, under pretence of baggage, to include articles not within the sense or meaning of the term, or within the object or intent of the indulgence of the carrier, and thereby defraud him of his just compensation, and subject him to unknown and illimitable hazards.’ In Hawkins v. Hoffman, Bronson, J., says: ‘An agreement to carry ordinary baggage may well be implied from the usual course of business: but the implication cannot be extended a single step beyond such things as the traveller usually has with him as part of his luggage. It is doubtless difficult to define with accuracy what shall be deemed baggage within the rule of the carrier’s liability. I do not intend to say that the articles must be such as every man deems essential to his comfort; for, some men may carry nothing, or very little, with them when they travel, whilst others consult their convenience by carrying many things. Nor do I mean to say that the rule is confined to wearing apparel, brushes, razors, writing-apparatus, and the like, which most persons deem indispensable. If one has books for his instruction or amusement by the way, or carries his gun or fishing-tackle, they would undoubtedly fall within the term baggage, because they are usually carried as such. This is, I think, a good test for determining what things fall within the rule.’ 6 Hill’s N. Y. R. 589, 590. It has been decided, that, under the term baggage, merchandise, as, silks or other fine articles, are not embraced (25 Wend. 458); nor large sums of money (9 Wend. 85); nor samples of merchandise (6 Hill’s N. Y. R. 586). A watch is embraced, according to the Ohio courts: 10 Ohio R. 145. So far as these rulings go, the doctrine may be considered as settled, and it must be considered as settled in all cases falling within the reason of those rulings. When, however, all this is done, the subject is disencumbered of but little of the difficulty which environs it. Nor does the text of Story, or the opinions of Judges Nelson and Bronson, relieve it of embarrassment. When we settle down with Judge Story upon the proposition that, by *baggage* is to be understood ‘such articles of necessity or personal convenience as are usually carried by passengers, for their personal use,’ we are still without a rule for determining what articles are included in baggage: for, such things as would be necessary to one man would not be necessary to another: articles which would be held but ordinary conveniences by A., might be considered encumbrances by B. One man, from choice or habit, or from educational incapacity to appreciate the comforts or conveniences of life, needs perhaps a portmanteau, a change of linen, and an indifferent razor; whilst another, from habit, position, and education, is unhappy without all the appliances of comfort which surround him at home. The quantity and character of baggage must depend very much upon the condition in life of the traveller,—his calling, his habits, his tastes, the length or shortness of his journey, and whether he travels alone, or with a family. If we agree further with Judge Story, and say that the articles of necessity or of convenience must be such as are usually carried by travellers for their personal use, we are still at fault, because there is in no state in this Union, nor in any part of one state, any settled usage as to the baggage which travellers carry with them for their personal use. The quantity and character of baggage found to accompany travellers, are as various as are the countenances of the travellers. The negative part of Judge Story’s definition, with more precision, furnishes a rule pro tanto. Baggage, he says, does not embrace merchandise, or other valuables not designed for personal use, but which are designed for other purposes,

*remoteness of the damages, the more convenient rule seems to be that suggested by Crompton, J., in *Smeed v. Foord*, 1 Ellis & Ellis 602 (E. C. L. R. vol. 102). "I doubt," says that learned judge, "whether in these cases it is the duty of the judge to lay down more to the jury than that the *plaintiff is entitled to such damages as are the natural consequences of the breach of contract. The question what are such natural consequences, is, I think, in each case rather for the jury than for the judge, just as it is for them, not for him, to assess the amount of damages." [*327 [*328]

**Kemplay*, in support of the rule.—The ordinary luggage of a passenger, whether by coach, by railway, or by steamboat, must be that which he requires for his personal use and convenience. That cannot extend to deeds, even if the passenger's own property. *Still less can it embrace deeds which belong to a third person. There is nothing in the language of Story, or in that of Lord Wensleydale in the case referred to, which militates against that construction. To allow a man to carry his own deeds about with him as "ordinary luggage," would be imposing an intolerable burthen upon railway companies. [*329 [*330]

ERLE, C. J. (stopping *Kemplay*).—I think the rule must be made absolute to reduce the verdict to 20*l*. The question is confined to the damage claimed in respect of the deeds which the plaintiff was carrying on a journey to a court where litigation was going on in which those deeds were of importance to the plaintiff's client, and of the money which was also necessary with reference to the same object, viz. the plaintiff's professional duty. The loss in reference to these was not in my judgment a loss connected in any way with luggage intended for the personal use of the plaintiff on his journey. It is agreed on all hands that it is impossible to draw any very well-defined line as to what is and what is not necessary or ordinary luggage for a traveller; that which one traveller would consider indispensable, would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance: and the law makes him responsible for all such things as may fairly be carried by the passenger for his personal use. When something is carried which *is manifestly not for personal use, or that which a traveller would ordinarily carry for his personal comfort or convenience, the carrier's responsibility ceases. For the articles which the plaintiff here was carrying, not for his own use, but for the service of another person, the company are not chargeable. [*331]

WILLES, J.—I am of the same opinion.

BYLES, J.—I am of the same opinion. A man's title-deeds and

such as, a sale or the like. We may safely say that it does not embrace merchandise or other articles which are intended to be sold. But it is not to be understood, I apprehend, that no article is embraced which may be classed with merchandise, or which is a valuable, other than such as is usual for personal use. Regard must be had to the quantity and value of the articles. A trunk of laces, for instance, although light and small in bulk, clearly is excluded. Their value would exclude them. The risk imposed upon the carrier is not that contemplated in the implied contract to carry *baggage*, and to be responsible for it. The liability in such a case would be wholly disproportioned to the compensation which he is presumed to derive from the fare of passengers. Besides, it is a fraud upon him to subject him to so great a hazard, without warning him of its existence."

securities do not, I think, fall within the description of "ordinary luggage." But, when those deeds and securities belong to another person, I think the case is clearer still. The responsibility of railway companies would be most alarmingly increased, if it were held that they could be charged with the safety of things like these. In this case, I see no distinction between the money and the deeds; though, under other circumstances (as my Brother Willes suggests to me), there might be a distinction.

MONTAGUE SMITH, J., concurred.

Rule absolute to reduce the verdict to 20*l*(a)

(a) See *Snead v. Watkins*, 1 C. B. N. S. 267 (E. C. L. R. vol. 87). There, one Hulme, who had formerly been clerk to the plaintiff, an attorney, was subpoenaed as a witness in an action brought by his late employer to recover the amount of a bill of costs. Hulme put up at a public house of entertainment at Westminster kept by the defendant, bringing with him a bag containing, amongst other things, a letter-book belonging to the plaintiff. Whilst at the defendant's house, Hulme became indebted to the defendant for lodging and refreshments, and quitted without paying his bill, leaving behind him the bag with the letter-book, which the defendant refused to deliver up to the plaintiff on demand, claiming a lien for his bill against Hulme. And it was held that the claim of lien was valid.

And see *Butcher v. The Eastern Counties Railway Company*, 16 C. B. 13 (E. C. L. R. vol. 81).

*332] *HANS PETER MOLLER and Others v. JECKS.
 May 29.

Timber was consigned by the plaintiff's ship Johan to the defendant, and landed and delivered to him in a harbour by the statute for the regulation of which certain dues were payable thereon by him. The defendant failing to pay these dues, the Johan was detained for nine days by the harbour authorities, at the expiration of which time the master obtained her release by paying the demand himself:—Held, that,—assuming that the defendant was by the statute liable to pay the dues, and that the detention of the vessel was justifiable,—the plaintiff was only entitled to recover the amount he had paid for the dues, but not damages for the time the vessel was detained; inasmuch as he might at once have procured her release by payment of the money.

THIS was an action upon a charter-party. The first count of the declaration stated that the plaintiffs and the defendant agreed by charter-party that the plaintiff's ship the Johan should with all convenient speed sail and proceed to Gefle (in the Gulf of Finland), or so near thereto as she might safely get, and that the defendant should there load her with a full and complete cargo of deals, battens, or other lawful merchandise, and that, being so loaded, she should therewith proceed to Great Yarmouth or Lowestoft, or as near thereunto as she might safely get, always afloat, and there deliver the same on payment of freight at certain rates therein agreed, and that the defendant should have fourteen days (Sundays excepted) for loading the said ship and discharging, and ten days on demurrage over and above the said laying days, at 3*l*. per day; that afterwards the said ship sailed to Gefle aforesaid, and was there loaded by the defendant with a full and complete cargo as agreed; that afterwards, on signing the bills of lading of the said cargo, the said ship was ordered to Lowestoft, and the plaintiff thereupon carried the said cargo in the said ship to Lowestoft aforesaid, and there delivered the same to the defendant as agreed; that all conditions were fulfilled, and all things were done and happened, and all times elapsed necessary to entitle the plaintiffs to have the said charter-party performed

by the defendant on his part, and to maintain this suit; and that the defendant kept the said ship on demurrage ten days beyond the periods as agreed upon for loading and discharge as aforesaid, and thereby became liable to pay to the plaintiff 30*l.* for demurrage as aforesaid, but had not paid the same.

*There was also a common count for demurrage, a count for money and harbour dues paid for the defendant, a count for [*333 work done and materials provided, and a count upon accounts stated.

The defendant, besides a traverse of all the material allegations in the declaration, pleaded, as to so much of the plaintiff's claim as related to the alleged keeping by the defendant of the ship on demurrage, that the plaintiffs hindered and prevented the said ship from being unloaded, and by their own acts and defaults caused the said ship to be detained, to wit, for the time during which the defendant was alleged to have kept the said ship on demurrage: and, as to the claim for money paid for harbour dues, the defendant paid into court 9*l.* 14*s.* 3*d.* Issue, and damages *ultra*.

The cause was tried before Cockburn, C. J., at the last Spring Assizes at Norwich. The facts which appeared in evidence were as follows:—The plaintiffs are the owners of the Swedish vessel *Johan*, whereof the plaintiff Hans Peter Möller is master. The defendant is a timber merchant at Norwich. On the 25th of July, 1864, Messrs. Hinde & Gladstone, of London, merchants, as agents for the defendant, chartered the *Johan* on a voyage from London to Gefle to load a cargo of deals and battens, and to proceed therewith to the ports of Great Yarmouth or Lowestoft, as ordered on signing bills of lading. By the terms of the charter-party, the cargo was to be brought alongside and taken from alongside by the merchants, according to the custom of the respective ports. By endorsement on the bill of lading, it appeared that seven working days were consumed in loading the cargo at Gefle.

The *Johan* in due course proceeded to Lowestoft, where she arrived and was reported at the Custom *House on the 14th of October, [*334 1864. She proceeded on that day to a place of discharge called Lucas' Wharf, where she had been ordered by one Rounce, who acted both for the ship and for the defendant. This, it appeared, was a mistake; on the following day the ship was ordered by the defendant to proceed to the Great Eastern Railway Wharf, where she remained until the 17th, when she was ordered by the defendant to proceed to his own wharf on the other side of the harbour. On the 18th the unloading commenced; but, in consequence of the defendant not having provided the necessary hands to receive the cargo from alongside, pursuant to the charter-party and the custom of the port, but requiring the crew to carry the deals, &c., from the ship on to the quay, the cargo was not entirely landed until the 25th, making seven working days (exclusive of the day of arrival) beyond the fourteen laying days allowed by the charter-party. The freight was paid on the 26th.

By the act for the regulation of the harbour of Lowestoft (7 & 8 Vict. c. xlii). certain dues are payable on the landing of goods there; and vessels are not allowed to clear out without a pass from the merchant to indicate that the dues have been paid. It was the duty of

the consignee under that statute to pay these dues (which amounted to 9*l.* 14*s.* 3*d.*); but, as he failed to do so, though repeatedly urged by the captain of the *Johan*, the captain, after a detention of nine days, paid them himself. For this the plaintiff claimed demurrage at 3*l.* per day for those nine days.

On the part of the defendant it was contended that the harbour authorities had no right under the statute to detain the ship for dues payable in respect of cargo; and, further, that, if they had, the captain might have paid the money and called upon the defendant to *335] reimburse him, but could not by omitting to adopt that *course entitle himself to demurrage for so long as he chose to stay.

Under the direction of the learned judge a verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter the verdict for him for 27*l.* if the court should be of opinion that the defendant was liable for the nine days' detention, and that the harbour authorities had a right to detain the vessel until the dues were paid.

Keane, Q. C., in Easter Term last, accordingly obtained a rule to show cause why a verdict should not be entered for the plaintiff for 27*l.*, on the ground that the defendant was liable for the detention of the vessel after discharge of the cargo, during so many days as the statutable duties on the cargo were unpaid. To show that the dues in question were payable by the consignee of the cargo, and that the ship was liable to detention for their non-payment, he relied mainly upon the 93d and 111th sections of the local act. Section 93 enacts "that there shall be paid to the said company of proprietors,(a) or to such person or persons as they shall appoint to collect and receive the same, for and upon all goods, wares, and merchandise conveyed inwards or outwards, or imported or exported to or from the said harbour, or carried upon the said rivers, lake, broad, dyke, cuts, and navigation, in sea-borne vessels, such rates or duties as the said company of proprietors shall order or direct to be paid, not exceeding the rates or duties contained in the schedule to this act annexed marked (A), which said rates and duties shall be paid by the master or commander, or other person or persons having the command or charge of any *336] ship or sea-borne vessel in which the same shall *be imported, exported, or carried, or by the merchant or merchants or other person or persons conveying, exporting, or importing, or carrying such goods, wares, and merchandise, or into whose custody or possession the same shall be delivered, or by whom the same shall be shipped respectively, upon the delivery or shipping of the same respectively." And the 111th section enacts "that, in case any master or commander, owner or owners of any ship or other sea-borne vessel, charged and chargeable with any rates or charges allowed to be taken and demanded by this act, shall refuse to pay the same, then and in such case it shall be lawful for the directors of the said company, or such person or persons as they shall appoint to be their collector or collectors, receiver or receivers, or any or either of them, from time to time to go on board any such ship or vessel to demand, collect, and receive the same, and, on the non-payment thereof, to take and distrain every ship or vessel, and all her tackle, apparel, and furniture, or any part thereof, either on board or on shore, and the same to detain until he or they

(a) "The Company of Proprietors of the Norwich and Lowestoft Navigation."

be paid and satisfied the said rates and charges; and, in case of any neglect and delay in payment thereof, then it shall be lawful for the said directors, or such person or persons as they shall have appointed, and shall from time to time appoint as aforesaid, their collector or collectors, receiver or receivers, to cause the same to be appraised by one or more sworn appraiser or appraisers, or other sufficient persons, and afterwards to sell the said distress and distresses, and therewith to satisfy himself or themselves, as well for and concerning the said rates and charges so neglected or delayed to be paid, and for which such distress and distresses shall be taken as aforesaid, as also for his or their reasonable charges in taking, keeping, appraising, and selling such distress, rendering to the master, commander, or owner of the *said ship or vessel in, to, or from which such distress shall [*337 be so taken or belong, the overplus (if any there shall be) on demand; and, if any owner, consignor, or consignee respectively of any coals, timber, goods, wares, or merchandise chargeable with any of the rates or charges mentioned in this act, or allowed to be taken under the provisions of this act, shall neglect or refuse to pay any of the said rates or charges before such coals, goods, timber, wares, or merchandise shall be shipped or removed from the place where the same shall be landed (as the case may be), it shall be lawful for the said directors, or their receiver or receivers, collector or collectors, to detain the said coals, timber, goods, wares, and merchandise till the said rates and charges, together with the reasonable costs and charges of keeping the said coals, timber, goods, wares, and merchandise, shall be paid and satisfied; and, in case such coals, timber, goods, wares, and merchandise shall happen to be removed before the rates or charges payable for the same shall be fully paid, then it shall be lawful for the said directors, or their collector or collectors, receiver or receivers, to distrain and take any goods or chattels of the owner, consignor, or consignee respectively, and to detain and sell the same in manner hereinbefore mentioned; or the said company shall and may prosecute any action or actions at law for recovery of the said rates or charges."

O'Malley, Q. C., and A. K. Stephenson, now showed cause.—By the local act, two sets of tolls or dues are payable, one in respect of the vessel (s. 96), the other in respect of the merchandise on board (s. 93); and full effect will be given to the words of the 111th section of the local act, by holding that the ship may be detained for the former, and the goods distrained for *the latter. The officers of the har- [*338 bour had no right to detain the ship for the dues payable by the consignee of the timber. And, even if they had, the plaintiff should have paid the money at once, and called upon the plaintiff to reimburse him, instead of waiting nine days, and so imposing a larger burthen upon the defendant. Besides, there was no evidence of actual detention. [ERLE, C. J.—No doubt, if the vessel had attempted to leave the harbour, she would have been stopped. WILLES, J.—"Demurrage" means a compensation for delay or detention of the ship by reason of the cargo not being taken out of her according to the terms of the charter-party. The claim here is for something altogether different.] There is no count applicable to it.

Keane, Q. C., and Markby, in support of the rule.—The verdict is to

be entered for the plaintiff for 27*l*. if the defendant was the person who ought to have paid the dues in question, and the harbour authorities had power to detain the vessel by reason of his default. That was the only matter reserved for the consideration of the court. If any objection had been taken to the frame of the record, the plaintiff would have applied for an amendment. That the dues in question were payable by the consignee of the cargo is clear from the act of parliament and the custom of the harbour of Lowestoft. [ERLE, C. J.—Under s. 93, the master, it would seem, is chargeable. He may recover the amount from the consignee. Here, the consignee has paid it. I cannot see what more the plaintiff can have. Is it reasonable that a foreign captain coming to an English port, without money, it may be, and without credit, should be called upon to pay another man's debt? The plaintiff clearly was entitled to wait a reasonable time to see if *339] the defendant would pay *the dues and release his ship. [ERLE, C. J.—At whose expense?] At the expense of the party in default.

ERLE, C. J.—I am of opinion that this rule should be discharged. I do not think it necessary to give any adjudication upon the construction of the statute. On the part of the defendant it has been insisted, that, by the 93d section of the act the dues are charged upon the ship; and that by s. 111 the ship was liable to detention to enforce payment. I do not say that this contention is well founded: but, for the purpose of this judgment, I assume it to be right; and, so assuming, I think the plaintiff has failed to establish his right to the 27*l*. The harbour authorities, it appears, made a claim on the plaintiff for 9*l*. 14*s*. 3*d*. for harbour-dues payable in respect of the cargo, which were properly, as between the parties, payable by the defendant. The proper course for the captain to have pursued, was, to pay the sum demanded, and sue the defendant as for money paid to his use. That was the appropriate remedy: and the declaration here contains a count for money paid; and under that the defendant has paid the money. The matter now in dispute is, whether the plaintiff can call upon the defendant to pay 3*l*. a day for the detention consequent upon his allowing the demand to remain unliquidated. There is no count in the declaration that is appropriate to such a claim. Assuming that the defendant ought to have paid it, the form of declaring would be in case for the breach of a statutory duty whereby a burthen was cast upon the plaintiff. But I cannot see a sign of actual damage which has resulted to the plaintiff from the defendant's breach of duty. If the plaintiff had paid the money, there would have been no detention. I do not mean to lay it down as an universal proposition that *340] the repayment of the money *in all cases cures the breach of duty. I give this judgment with some dissatisfaction, because it does not very clearly appear either from the learned judge's notes or the statements of the respective counsel how the case was put at the trial. But I am unable to find any evidence to sustain such a count as I have supposed.

WILLES, J.—I also think the rule should be discharged. I understand the reservation to have been, whether on the record as it stands, or as it might be framed by any amendment, the plaintiff is entitled to recover the 27*l*. As the record stands, the plaintiff clearly is not

entitled to recover that sum. There is a count for demurrage: and there is a count for money paid. As to the latter, money has been paid into court. If any amendment were made, it would be by expanding the count for money paid into a special count claiming damages against the defendant for not having paid harbour-dues which we assume he ought to have paid. Having read the notes of the learned judge attentively, and listened to the arguments at the Bar, I see no evidence upon which such a count could be sustained. It appears that the cargo was all cleared out of the ship by the 25th of October, and the freight, &c., paid to the master on the 26th. The defendant, erroneously it may be, objected to pay the 9*l.* 14*s.* 3*d.* for dues payable for landing the cargo. The master might and ought to have paid those charges and sailed out of the harbour, resorting to his remedy against the merchant afterwards. A man has no right to aggravate damages against another by the course of proceeding adopted by the plaintiff here. It seems to me that the amendment, if made, could at the most only entitle the plaintiff to nominal damages, and therefore it ought not to be made at all.

BYLES, J.—I am of the same opinion. I say nothing *as to the construction of the statute. Upon the declaration as it [*341 stands, it is plain that the plaintiff cannot recover the 27*l.* And it is not a case for amendment.

MONTAGUE SMITH, J.—I also disclaim giving any opinion upon the construction of the statute; because, assuming that the harbour authorities had a right to detain the plaintiff's vessel for non-payment of the dues payable in respect of the cargo, I think the plaintiff is clearly not entitled to recover the 27*l.* The form of the rule induces me to think that it was not the mere question as to the construction of the statute that was intended to be reserved for the court. The plaintiff had no right to keep the ship at Lowestoft until the defendant paid the dues. There may be cases where a party might have a right to recover substantial damages for the defendant's failure to pay money, where the sum which the plaintiff was called upon to pay in consequence of the defendant's default was a very large one. But, on looking through the evidence here, I see nothing to warrant the damages which the plaintiff claims. He might as well have paid the money on the first day as on the ninth. He was probably liable as well as the consignee. He has got his money back, if he was not; and I do not see what further damage he has sustained.

Rule discharged.

*In the Matter of an Arbitration between WILLIAM NEW-
TON and JOSEPH HETHERINGTON. *June 2.* [*342

1. A lease contained a proviso, that in case any disputes and differences should arise between the parties, they should be referred to two arbitrators, one to be chosen by each party, and that, if either of them should neglect to name an arbitrator on his part within seven days after notice of the appointment of an arbitrator by the other, the arbitrator so appointed should act for both: and it was further agreed that "the submission of the said parties to the award of the said arbitrators or arbitrator might at the instance of either party be made a rule of court."

Disputes having arisen, the lessor appointed an arbitrator in writing, and gave notice in writing to the lessee that he had done so: the latter did not appoint an arbitrator on his part;

whereupon, after due notice, the arbitrator appointed by the lessor proceeded *ex parte*, and made an award :—

Held, upon the construction of the 17th section of the Common Law Procedure Act, 1854, that, upon filing the appointment, with an affidavit by the lessor verifying his signature thereto, the submission might be made a rule of court.

2. Held also, that, by the combined effect of the 17th and 26th sections, an affidavit by the attesting-witness to the lease was not necessary.

By an indenture of lease of the 12th of October, 1859, between William Newton of the one part, and Joseph Hetherington of the other part, it was witnessed, that, in consideration of the rent therein reserved, and of the covenants and agreements therein entered into by Hetherington, Newton did demise and lease unto Hetherington, his executors, &c., certain rooms in a certain mill situate in Store Street and Lark Street, in Manchester, together with certain premises adjoining, and certain fixtures thereto belonging, for twenty-one years from the 25th of March, 1859, at the rent of 200*l.* per annum : and, amongst other covenants, it was provided that “for the purpose of settling disputes, it was thereby agreed and declared by and between the said J. Hetherington and W. Newton, that, in case any disputes or differences concerning any matter or thing thereinbefore mentioned or expressed or intended to be referred to arbitration, or any other dispute or difference between the said J. Hetherington and the said W. Newton, or between their respective heirs, executors, administrators, or assigns touching or concerning the said lease, or any of the covenants or agreements therein contained, or touching or concerning any matter or thing to be done, observed, or performed by any person or *343] persons by virtue of the said *lease, the subject-matter of every such dispute or difference should be referred and left to the arbitration of three indifferent persons, one to be named by each party in dispute, and the third by the two so first chosen, and the award of such three arbitrators or of any two of them should be binding and conclusive on all parties ; and, if either party should neglect to name an arbitrator on his or their part within seven days after notice in writing from the other of the said parties requiring him or them so to do, then the dispute should stand referred to the person who should have been named by the party giving such notice ; and, in either of the said cases, the determination of the arbitrators or arbitrator should be final and conclusive on both the said parties in regard to the matter aforesaid, and their and his respective heirs, executors, administrators, and assigns : and it was further agreed that the submission of the said parties to the award of the said arbitrators or arbitrator might at the instance of either party be made a rule of any of Her Majesty’s courts of record at Westminster.”

Differences having arisen between the parties in reference to the payment of certain poor-rates and township and highway-rates, Mr. Newton, on the 26th of October, 1864, caused the following notice to be served on Mr. Hetherington :—

“ Manchester, 26th October, 1864.

“ Sir,—Disputes and differences concerning certain matters and things arising out of the lease bearing date the 12th day of October, 1859, and made by me to you, of rooms in a certain mill and of land in Lark Street and Store Street, in the city of Manchester, in the county of Lancaster, with steam-power, for the term of twenty-one

years from the 25th day of March, 1859, having arisen between me and you, I desire to have the same settled by arbitration, in terms of the *proviso in the said lease in that behalf contained. I therefore hereby give you notice that I have this day appointed [*344 Mr. E. Corbett, of Manchester, surveyor, to be the arbitrator on my behalf: And I hereby give you further notice within seven days from the service of this notice on you to name an arbitrator to act on your behalf in the matter of the said disputes and differences: And I hereby give you further notice, that, if you shall neglect to name an arbitrator to act on your behalf within seven days after the service of this notice on you requiring you so to do, then the aforesaid disputes and differences between me and you will, according to the proviso in the said lease in that behalf contained, stand referred to the said Edward Corbett alone, whose determination thereon will be final and conclusive."

The appointment of Corbett as arbitrator for Newton, was as follows:—

"Manchester, 26th October, 1864.

"To Mr. Edward Corbett.

"Sir,—I hereby appoint you arbitrator to act on my behalf in respect of certain disputes and differences which have arisen between me and Mr. Joseph Hetherington, of Manchester, machinist, arising out of certain provisions in a lease bearing date the 12th day of October, 1859, for the term of twenty-one years from the 25th day of March, 1859, of certain rooms and land, with steam-power for the working of the premises comprised in the said lease. And I beg to inform you, that, by a notice in writing bearing even date herewith, I have called upon the said Joseph Hetherington to nominate and appoint an arbitrator to act on his behalf in respect of the before-mentioned disputes and differences existing between us. I enclose you the lease.

"WILLIAM NEWTON."

*Hetherington did not within the time limited or at any [*345 time appoint an arbitrator to act on his behalf, and Newton, on the 9th of November, called upon Mr. Corbett to proceed as sole arbitrator. Accordingly, Mr. Corbett on the same day appointed the 12th for proceeding with the reference, and gave Hetherington due notice of the time and place so appointed. Hetherington not attending on that day, a peremptory appointment for the 14th was served upon him, and afterwards a further notice that the arbitrator would on the 17th proceed ex parte. Hetherington still neglecting to attend, the arbitrator proceeded, and, on the 10th of January, 1865, made his award in favour of Newton for 128*l.* 10*s.* 5*d.*

Upon an affidavit of these facts, and verifying the signature of Hetherington to the counterpart lease,

Crompton Hutton, in Easter Term last, obtained a rule calling upon Hetherington to show cause why the indenture of the 12th of October, 1859, containing an agreement for submission to arbitration, and the appointment of an arbitrator made in pursuance thereof, should not respectively be made a rule of this court.

R. G. Williams now showed cause.—It is the submission that is to be made a rule of court. The question is, whether there is here any such submission to arbitration as can be made a rule of court either

under the 9 & 10 W. 3, c. 15, or under the Common Law Procedure Act, 1854. The 1st section of the 9 & 10 W. 3 expressly provides that it shall be lawful for the parties to a reference "to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of His Majesty's courts of record which the parties shall choose, and to insert such their agreement in their submission, or the *condition of the bond or promise

*346] whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons, which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, *upon producing an affidavit thereof made by the witnesses thereunto, or any one of them*, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the said court that the parties shall submit to and finally be concluded by the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire, pursuant to such submission." There is no such affidavit here. The 17th section of the 17 & 18 Vict. c. 125, enacts that "every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court." That section does not repeal the statute of W. 3, but only extends its operation to instruments which do not contain a provision for making them rules of court. Then the 26th section of the Common Law Procedure Act,—which provides that "it shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and that such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto,"—does not apply to a case where the production of an affidavit by an attesting witness is required as a condition precedent. The proviso in this lease contemplates that it is some

*347] other document that is to be made a *rule of court. In *Ex parte Glaysher*, 3 Hurlst. & Colt. 442, it was held, that, where parties to a deed covenant to refer disputes which may arise to arbitrators to be chosen by them, and on disputes arising appoint arbitrators, *the submission is by parol*, and therefore cannot be made a rule of court under the 17th section of the Common Law Procedure Act, 1854. Pollock, C. B., delivering the judgment of the court after time taken to consider, says: "There is an obvious distinction between an agreement to refer to an arbitrator *to be appointed* any matter of difference which may thereafter arise, and an agreement to refer to an arbitrator named a matter which has already become the subject of dispute. If there be a general agreement to refer future disputes to one or more persons to be appointed, and in pursuance of that disputes are referred, the submission is by parol, although the agreement is by deed; and a parol submission cannot be made a rule of court." It is impossible to distinguish that case from the present. [ERLE, C. J.—Here, the appointment is in writing.] One of the parties appoints an arbitrator, and calls upon the other to appoint. He omits to do so.

There is no agreement in writing by the two to appoint that one arbitrator: therefore, there is no complete submission in writing. And there is no affidavit verifying the signature even of the one who purports to appoint.

C. Hutton, in support of his rule, referred to s. 13 of the Common Law Procedure Act, 1854.(a)

*ERLE, C. J.—I am of opinion that this rule should be made absolute. The 9 & 10 W. 3, c. 15, s. 1, and the Common Law [*348 Procedure Act, 1854, authorize the making of a submission *in writing* a rule of court. The instrument upon which the question arises here contains a submission upon a contingency,—in the event of any difference or dispute arising between the parties, one is to appoint an arbitrator, and by notice to call upon the other to appoint one on his part, and then the two are to appoint a third, and the award is to be made by the three or by any two of them; but, in the event of one party, on receiving notice of the appointment of an arbitrator by his adversary, refusing or neglecting to appoint one on his behalf, the arbitrator already appointed is to be the arbitrator of both, and his award is to be final and binding. I will assume, on the authority of *Ex parte Glaysher*, 3 Hurlst. & Colt. 442, that to make this a complete submission, an arbitrator should be appointed *in writing*. *Parkes v. Smith*, 15 Q. B. 297 (E. C. L. R. 69), is a distinct authority to show that this is a submission which may be made a rule of court. It was there held that a covenant by indenture (of partnership), that any differences which might thereafter arise between the parties touching the matter of the indenture should be, and they were thereby, [*349 *referred to an arbitrator named, constituted a submission which might be acted upon and made a rule of court under the statute 9 & 10 W. 3, c. 15, when such differences arose. The only distinction between that case and this, is, that there the name of the arbitrator was inserted in the deed, whereas here the deed contains a submission to arbitration without naming the arbitrator. In pursuance of the stipulation in the indenture, one party has named an arbitrator, and has called upon the other to name one on his part; the latter refuses to do so: and the question is whether we can take notice by affidavit that the contingency has happened upon the happening of which the arbitrator appointed by one party was to be the arbitrator authorized to act for both. I am of opinion that we can. We therefore make the deed, with the appointment verified by affidavit, a rule of court, under the authority of the statutes. It is very like the ordinary case of the appointment of an umpire on two arbitrators differing. It is only upon the contingency of the arbitrators disagreeing that the

(a) Which enacts, that, "when the reference is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party, in case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorizing the reference show that it was intended that the vacancy should not be supplied; and if on such reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been made by consent: provided, however, that the court or a judge may revoke such appointment, on such terms as shall seem just."

umpire is to be appointed to act. In that case the submission may be made a rule of court, though there be no writing (except the recital in the award) to show that the arbitrators have disagreed. The rule must be made absolute.

WILLES, J.—I am of the same opinion. The first objection,—that there is no affidavit by the attesting witness,—is founded upon the notion that this is an application under the 9 & 10 W. 3, c. 15. But the combined effect of the 17th and 26th sections of the Common Law Procedure Act, 1854, makes it unnecessary to have an affidavit by the attesting witness, it not being necessary to the validity of the lease *350] that there should be an attesting witness. The second *objection is, that the affidavit does not allege that the appointment of the arbitrator by Newton was signed. That becomes only an obstructive objection, when the 46th section of the Common Law Procedure Act 1854, is referred to; which provides, that, “upon the hearing of any motion or summons, it shall be lawful for the court or judge, at their or his discretion, and upon such terms as they or he shall think reasonable, from time to time to order such documents as they or he may think fit to be produced, and such witnesses as they or he may think necessary to appear and be examined *vivâ voce* either before such court or judge, or before the master, and, upon hearing such evidence, or reading the report of such master, to make such rule or order as may be just.” The court may apply that provision to any rule that comes before it. Mr. Williams does not suggest that the signature was not attached to the document, and therefore we will assume that it was. As to the third objection, which was founded upon the case of *Ex parte Glaysher*, 3 Hurlst. & Colt. 442, it is enough to say that that case is inapplicable, because there the submission was by parol. Here, it is clear that there was an appointment in writing, which by the agreement of the parties was to become the appointment of both, on the refusal of one upon due notice to appoint an arbitrator on his part.

BYLES, J., and MONTAGUE SMITH, J., concurring.

Rule absolute, “upon filing in the offices of the Masters of this court the said original appointment, with an affidavit by the said William Newton verifying his signature to the same,”—without costs on either side.

*851] *RYLANDS and Another v. KREITMAN. June 10.

A contract for the sale of cotton of a given quality is not performed on the part of the seller, by a tender of a larger quantity, out of which the buyer is required to select those bales which answer the description of the cotton contracted for.

THIS was an action for not accepting cotton according to contract. The first count of the declaration alleged that the defendant bought of the plaintiffs 500 piculs of China cotton at 19½d. per lb., guaranteed “fair,” and to be delivered in the month of June, 1864; in case of dispute, the matter to be referred to two respectable brokers, as to quality, and allowance to be made; the cotton to be delivered to the buyer in merchantable condition: Breaches, non-acceptance, and notice that the defendant would not accept.

The second count stated the contract as in the first, and alleged that the defendant gave such further time for delivery as might be necessary for making the cotton merchantable: Breaches, non-acceptance, and notice that the defendant would not accept: Claim, 600*l*.

The defendant pleaded,—first, to the first count, nonassumpsit,—secondly and fourthly, to the two breaches in the first count, that the plaintiffs were not ready and willing to deliver the cotton required by the contract,—thirdly, a traverse of the allegation of notice that the cotton was ready to be delivered,—fifthly, mutual waiver of the contract,—sixthly, that a dispute arose before breach, which was referred to two brokers, who awarded that the cotton was not merchantable, and that the plaintiffs would not make the same merchantable or deliver other cotton in its stead,—seventhly and twelfthly, a traverse of the breaches in both counts,—eighthly, to the last count, a traverse of the contract and notice,—ninthly, to the last count, that the plaintiffs were not ready and willing to deliver,—tenthly, a traverse of notice to the defendant *that the plaintiffs were ready to deliver,—eleventhly, a traverse that the plaintiffs were [*352 ready and willing to make the cotton merchantable.

The plaintiffs joined issue on all the pleas, and also replied to the second plea that they were ready to deliver the cotton, and, to the fourth plea, that, at the time of the notice given by the defendant, it was not necessary that the cotton should be ready for delivery. Issue.

The cause was tried before Mellor, J., at the last Spring Assizes at Liverpool. The facts were as follows:—On the 10th of May, 1864, the plaintiffs contracted to sell to the defendant 500 piculs of China cotton at 19½*d*. per lb., “to be delivered in the month of June next,” with a stipulation, that, in case of dispute, the matter should be referred to two respectable brokers, as to quality, and allowance to be made. On the 4th of June, the sellers declared 287 bales of China cotton by the Offer, and 20 bales by the Jane Leach. The quality was objected to, and the matter referred to arbitrators. The 287 bales by the Offer were found not to be in merchantable condition; and of the 20 bales by the Jane Leach, five were not merchantable, but fifteen were: the rest was not made merchantable until the end of July. An attempt was made to prove a declaration of a further quantity before the end of June; but this the jury negatived. The defendant refused to accept any part of it; and the 500 piculs were afterwards resold, 420 piculs at 18*d*. and 80 piculs at 18½*d*. per lb.

Two cotton brokers of experience proved that the usage of the trade on contracts of this sort, was, that the seller might deliver the cotton in one or several quantities within the stipulated time; and that, if the seller is not in a position to complete the full quantity within the time limited, the buyer has the option, after *giving [*353 notice, to go into the market and complete it, claiming any difference against the seller.

On behalf of the defendant it was submitted that there was no evidence of readiness and willingness on the part of the plaintiffs to deliver the cotton within the time limited by the contract, the cotton declared not being made merchantable in the month of June; and that the usage spoken to by the plaintiffs’ witnesses did not show that

the defendant was bound to select the sound out of the unsound of the twenty bales tendered ex Jane Leach.

For the plaintiffs it was insisted that the defendant was at all events bound to accept the 15 bales.

The learned judge told the jury that the question for them was, whether the plaintiffs were ready and willing and able to deliver 500 piculs of China cotton to the defendant, of fair quality and in merchantable condition, in the month of June; observing that the plaintiffs, by the usage of the trade, were not bound to deliver all at once. He further told them that notice that the cotton was ready for delivery must be given; and he left it to them to say (if it was a question for them) whether the notices given were sufficient.

The jury found that at no time in the month of June were the plaintiffs able to deliver more than fifteen bales in a merchantable condition, and that the second notice was not proved.

A verdict was thereupon entered for the defendant, leave being reserved to the plaintiffs to move to enter the verdict for them for 10*l.* 1*s.* 6*d.* if the court should think that they were under the circumstances entitled to recover in respect of the fifteen bales.

E. James, Q. C., in Easter Term last, obtained a rule nisi accordingly.

*354] *Mellish*, Q. C., and *G. Williams*, now showed cause.—It may be conceded that the plaintiffs proved a custom obliging the buyer on a contract like this to take part of the quantity contracted for, allowing the seller to tender the rest afterwards; but that custom does not authorize the seller to bind the buyer by a tender of a large number of bales, and cast upon him the responsibility of selecting out of them those which are merchantable. Here, the plaintiffs make a declaration of 307 bales; and they tender 287 bales by the Offer, and 20 by the Jane Leach: of these, only 15 of the latter were in a merchantable condition. Could it be said under these circumstances that the plaintiffs were *ready* to deliver the cotton according to the contract? In *Cunliffe v. Harrison*, 6 Exch. 903, in an action for goods sold and delivered, to recover the price of ten hogsheads of claret, it appeared that the defendants, having verbally ordered certain hogsheads of the plaintiff, the latter, in October, sent them fifteen, whereupon the defendants, by letter, informed the plaintiff that they had requested ten only should be shipped, and that they could take that number only on their proving satisfactory, and that they would hold the other five on the plaintiff's account. In answer to this, the plaintiff replied by letter, which, after stating that he regretted that any misunderstanding as to the defendants' order should have taken place, and after stating that other vintages were inferior, and that the wine sent was of superior character, concluded thus,—“You will ascertain in the Spring whether you have room for it; and you have seen that we are not stringent with old customers as to credit.” The defendants placed the wine in a bonded warehouse in their own names, and shortly afterwards tasted the wine, and disapproved of it, and gave the plaintiff notice in the early part of April that they would not take
*355] any part of it. It was held, first, *that, supposing there was a written contract by which the defendants were bound to take ten hogsheads of claret, the contract was not executed, as *fifteen*, and

not ten, had been delivered, and no particular ten had been selected out of the fifteen; and, secondly, that there was no acceptance within the 17th section of the Statute of Frauds, inasmuch as the defendants under the contract had the option of rejecting the wine in the Spring, and they had availed themselves of that option. Parke, B., there says: "The delivery of fifteen hogsheads, under a contract to deliver ten, is no performance of that contract; for, the person to whom they are sent cannot tell which are the ten that are to be his; and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him." And Martin, B., says: "Assuming that there was evidence of a contract for ten, and that the defendants had expressed themselves satisfied with the quality of the wine, and had agreed to take ten out of the fifteen, I am of opinion that the plaintiff could not maintain this action for the ten; for, I think that the ten ought to have been separated from the fifteen." That is confirmed by *Levy v. Green*, 8 Ellis & B. 575 (E. C. L. R. vol. 92), in error, 1 Ellis & Ellis 969 (E. C. L. R. vol. 96). There, in an action for goods sold and delivered, with a plea of never indebted, it appeared that the defendant ordered of the plaintiffs certain specified quantities of particular kinds of crockery, to be sent to him by railway. The plaintiffs sent a crate containing a smaller quantity of the particular goods, also other goods not ordered, and of such a nature as to be distinguishable from the others: and they sent one invoice debiting the defendant with the contents of the whole crate. The defendant refused to receive them, assigning as his reason that they were out of time. At the trial it was objected *that the defendant was not bound to take any part of the goods, because [*356 of the manner in which they were sent, accompanied by goods not ordered. Leave was reserved to enter a nonsuit on this ground, subject to which a verdict was found for the plaintiff for the price of the goods which corresponded with the order. Upon the argument of the rule, the Court of Queen's Bench was divided in opinion: but the Exchequer Chamber, on appeal, made the rule absolute. That is a much stronger case than this. Willes, J., there says: "The question here is the same as would have been raised if the action had been brought for not accepting, viz., whether the goods sent were those which the defendant had ordered, and was bound to pay for. Now, in an action for not accepting, the plaintiffs could not have supported an averment that they were ready and willing and offered to deliver those goods so ordered: they could only have averred that they offered to deliver part of those goods, together with certain others. Such an averment would be bad in substance. That would seem to follow from the decision in *Dixon v. Fletcher*, 3 M. & W. 146. It may be, no doubt, that there are some cases in which an addition of other articles to the goods ordered might make no substantial difference: and a jury might consider those others as mere dunnage, added for the sake of secure package. But I think it is impossible to look in that light at the articles added here, considering their nature, and that they were put in at a stated price. Adopting the view taken by Lord Campbell, C. J., and not laying down any general rule, I think that, in such a case as this, where the goods were all in one parcel, and entered in one invoice, so that the purchaser, if he accepted his

own goods, would incur the risk of being held to have accepted the whole, he was not bound to accept at all." And Bramwell, J., says: *357] "I think, that, if the *defendant had accepted the goods ordered by him, he would have run great risk of being held to have accepted the other goods sent with them. At all events, he could hardly understand the plaintiffs to say, in effect, 'Take out of the crate what you ordered; if you do not like to have the rest, let them lie where you please, or remove them to some convenient distance.' He could not but think that the plaintiffs made him a tender either of the whole or none, or of goods ordered by him, with a stipulation that he must select them from among the whole, and send back the rest. He was not under any obligation either to accept the former tender, or to undertake the obligation and trouble imposed upon him by the latter. He was entitled to an unconditional tender; and, such a tender not having been made, he was at liberty to refuse to accept." So here, the defendant was entitled to an unconditional tender of such cotton as the plaintiffs were prepared to deliver to him in accordance with the contract.

E. James, Q. C., Russell, and Herschel, in support of the rule.—These contracts are entirely sui generis, and must be construed by the light of the usage. Cotton is always understood to be delivered in a merchantable condition: sometimes it is "to be made merchantable." The practice is, to give the buyer notice of the arrival of the ship, and if, of 500 bales contracted for, 300 are found to be unmerchantable, and 200 merchantable, he is bound to take the 200; and, if the 300 can be made merchantable within the stipulated time, he must take them also. It is for the buyer to take or to reject. Here, the seller was ready in June to deliver 15 bales which were merchantable. These the purchaser was bound (coupling the custom with the contract) to accept. It was not the less a fulfilment of the contract on the part of the seller, that these 15 were accompanied by 5 more which *358] the buyer *was not bound to accept. The cases cited have no material bearing on this. In *Cunliffe v. Harrison*, 6 Exch. 903, the question was whether there was an acceptance of the clare: within the 17th section of the Statute of Frauds. In *Levy v. Green*, 8 Ellis & B. 575 (E. C. L. R. vol. 92), 1 Ellis & Ellis 969 (E. C. L. R. vol. 96), the defendant was put to some difficulty and risk in the selection of the goods which he had ordered from those which he had not: and some members of the court intimated an opinion, that, if no difficulty in the selection and no risk had been imposed upon the defendant by the mode of executing the order, they would have held him bound to take those goods which he contracted for. [WILLES, J.—I have tried several such cases; and I have always told the jury to find for the defendant if they thought any substantial difficulty was imposed upon him; and, if not, to find for the plaintiff.]

ERLE, C. J.—I am of opinion that this rule should be discharged. There is no doubt about the law as applicable to this subject. If the vendor in performance of a contract sends more goods than the buyer engages to receive, and trouble or risk is thereby imposed upon the latter in ascertaining what is and what is not in accordance with the contract, the buyer is not bound to accept.

BYLES, J.(a)—I am of the same opinion. The only question is, whether or not the vendors were ready and willing within the month of June to deliver any part of the cotton contracted for. I am of opinion that they were not.

MONTAGUE SMITH, J., concurred.

Rule discharged.

(a) Willes, J., had gone to Chambers.

***ROBERT MORRIS and Lydia, his Wife, v. MOORE.** [*359
June 10.

Since the Common Law Procedure Act, 1852, s. 40, a count for breaking and entering the premises of *the husband* may be joined with a count by the *husband and wife* for assaulting and imprisoning the wife.

THE first count of the declaration was for assaulting the plaintiff Lydia, and giving her into custody upon a false and unfounded charge: the second was for breaking and entering the rooms of the husband, and destroying his furniture, &c. On the first count, the plaintiffs claimed 100*l.*, and in the second Robert Morris claimed 10*l.* The jury assessed the damages at the trial separately.

Powell, Q. C., now moved to arrest the judgment, on the ground that the joinder of these two counts was not warranted by the 40th section of the Common Law Procedure Act, 1852, which enacts, that, "in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right; and separate actions brought in respect of such claims may be consolidated, if the court or a judge shall think fit: provided that, in the case of the death of either plaintiff, such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate." Upon this clause Mr. Day observes,—“The above enactment is limited to actions ‘for an injury done to his wife.’ It permits the husband to add to the joint cause of action claims arising to himself in his own right. The section does not in terms limit the claims which may be thus added to those he has *in respect to the injury done to the wife* (as, for a surgeon’s bill); and it might thence be argued that the husband may not only add counts against the defendant for the *special damage* he has sustained in respect of the injury to the wife, but *also [*360 counts for *goods sold and delivered* or *money lent* by himself. But the intention of the commissioners, in recommending the change effected by this section,(a) seems to have been, that claims arising to the husband in respect of the injury to the wife, and those alone, should be included in the joint action.”(b) [WILLES, J.—Mr. White-side’s Act (the Irish Common Law Procedure Act) allows debts due to the husband to be joined. The better opinion seems to be that this act applies to wrongs only.] These claims clearly could not have been joined before the passing of the Common Law Procedure Act, and there appears to have been no attempt to join them since, until the present.

(a) First Report, p. xi.

(b) Day’s Common Law Procedure Act, p. 42.

ERLE, C. J.—The words of s. 40 are wide enough to embrace this: and the general tendency of modern legislation is, to prevent such objections.

The rest of the court concurring,

Rule refused.

*361]

*MURPHY v. SMITH. May 31.

To render a master liable for an injury to one in his employ, through the negligence of another person also in his employ, it must be shown that the latter was placed by the master in such a position of trust and authority as to be fairly considered as his representative in the establishment.

THIS was an action brought by the plaintiff, a boy about sixteen years of age, to recover from the defendant damages for an injury alleged to have been sustained by him in consequence of the negligence of a person in the defendant's employ, who was said to be his deputy-foreman or manager.

The cause was tried before Keating, J., at the second sitting in Middlesex in Easter Term last. The facts which appeared in evidence were as follows:—The defendant was the proprietor of a lucifer-match manufactory. One Simlack was his foreman or general manager; and under him was a workman named Debor, who in Simlack's absence assumed the management of the establishment. The plaintiff had been engaged by Simlack. One portion of the process of making lucifer-matches consists in the mixing of the compound in which the ends of the matches are dipped. This consists of a variety of chemical substances, one of which is chloride of potass. The mixture is free from danger until the chloride of potass is put to it; and then it requires to be stirred by an experienced hand, or it is liable to explode. It was no part of the plaintiff's duty to touch this mixture. He, however, on the occasion in question, stirred up the compound with a stick after the chloride of potass had been added; and the consequence was that an explosion took place, and the plaintiff was very seriously injured.

It was proved that Debor was standing by at the time; but it did not appear that the plaintiff was doing what he did under Debor's direction. There was no evidence to show that the general manager, Simlack, was absent from the premises at the time.

*362] *Under these circumstances, it was submitted on the part of the defendant that there was no evidence for the jury, the accident being the result of the negligence (if any) of a fellow-workman, for which the master would not be legally responsible.

The learned judge reserved the point; and he asked the jury whether they thought the accident was caused by the negligence of Debor, and whether he was at the time acting as the manager of the establishment.

The jury answered both questions in the affirmative, and returned a verdict for the plaintiff, damages, 20*l*.

Montague Williams, in Easter Term last, obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, on the grounds,—first, that there was no evidence of Debor's being acting manager, so as to

take him out of the class of fellow-servants,—secondly, that, even if he were, there was no evidence of negligence on his part.

Tindal Atkinson, Serjt., and *Philbrick*, now showed cause.—There was abundant evidence that Debor, who was acting as the defendant's manager at the time, was guilty of negligence in permitting a child of tender years to do that which could only be done safely by a person of experience. The general rule undoubtedly is, that a servant has no redress against his master for an injury sustained by him in consequence of the negligence of a fellow-servant or workman. "Where, however," says Mr. Smith, *Master and Servant*, 2d edit. 150, "a master employs boys and girls, or inexperienced workmen, and directs them to act under the superintendence, and to obey the orders of a deputy, whom he puts in his place, it may be they are not, within the meaning of the rule, employed in a *common work. They [*363 are acting in obedience to the express commands of their employer, and if he, by the carelessness of his deputy, exposes them to improper risks, it may be that he is liable for the consequences. A girl, only nine days in the defendant's employ in a clay-mill, was unaware of the risks from machinery. A., acting under the defendant as manager of the works, put her to remove some waste clay while the rollers were in motion. A. ought to have done this himself; and it ought not to have been done at all till the movement of the rollers was suspended. The little girl, in attempting to remove the waste clay, in obedience to A.'s order, sustained a severe injury from the rollers; for which she brought an action against the master; and he was held liable: *O'Byrne v. Burn*, 16 Sec. Ser. (Scotch. Rep.) 1025. Speaking of this case, in *The Bartonshill Coal Company v. Reid*, 3 Macq. 266, 295, Lord Cranworth, C., says: "This might have been quite right. It may be, that, if a master employs inexperienced workmen, and directs them to act under the superintendence and to obey the orders of a deputy whom he puts in his place, they are not, within the meaning of the rule in question, employed in a common work with the superintendent. They are acting in obedience to the express commands of their employer, and, if he by the carelessness of his deputy exposes them to improper risks, it may be that he is liable for the consequences." The facts of this case clearly bring it within the qualification of the rule there stated. In *Clarke*, app., *Holmes*, resp., 7 Hurlst. & N. 937, the plaintiff was employed by the defendant to oil dangerous machinery; at the time the plaintiff entered upon the service, the machinery was fenced, but the fencing became broken by accident; the plaintiff complained of the dangerous state of the machinery, and the defendant promised him that the *fencing [*364 should be restored; the plaintiff, without any negligence on his part, was severely injured, in consequence of the machinery remaining unfenced; and it was held by the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the defendant was liable for the injury. "No doubt," says Cockburn, C. J., "when a servant enters on an employment from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or, if he thinks proper to accept an employment on machinery defective from its construction, or from the want of proper repair, and with knowledge of the fact enters on the service, the master cannot be held liable for

injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment. The rule I am laying down goes only to this, that the danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept." And Byles, J., said: "The case of *Priestly v. Fowler*, 8 M. & W. 1, introduced a new chapter into the law; but that case has since been recognised by all the courts, including the court of error and the House of Lords. So that the doctrine there laid down, with all the consequences fairly deducible from it, are part of the law of the land. But the principles laid down in *Priestly v. Fowler*, and all the examples there given of their application, relate to the conveniences and casualties of ordinary or domestic life, and ought not to be strained so as to regulate the rights and liabilities arising from the use of dangerous machinery. It is in most cases impossible that a workman can judge of the condition of a complex and dangerous machine, *365] *wielding irresistible mechanical power; and, if he could, he is quite incapable of estimating the degree of risk involved in different conditions of the machine; but the master may be able, and generally is able, to estimate both. The master again is a volunteer, the workman ordinarily has no choice. To hold that the master is responsible to his workman for no absence of care, however flagrant, seems to me in the highest degree both unjust and inconvenient. On the other hand, to hold that the master warrants the safety and proper condition of the machine, is equally unjust to the master; for, no degree of care can insure perfect safety; and it is equally inconvenient to the public, for, who would employ such machines if he were an insurer? It seems to me that the true rule lies midway between these extremes, and I therefore agree in the conclusion arrived at by the Lord Chief Justice." A dangerous machine is very analogous to a dangerous compound; and the observations made by the judges in that case there are equally applicable here. [BYLES, J.—I do not think the majority of the court there coincided with what was said by two of the judges.] The question was for the jury.

Warton, in support of the rule.—In *Paterson v. Wallace*, 1 Macq. 748, it was held that a master is bound to take all reasonable precautions to secure the safety of his workmen; more especially if the work be of a dangerous character, and the persons engaged proverbially reckless: and this is said by Lord Cranworth to be the law of England no less than that of Scotland. But the law of England does not make a master responsible for an injury resulting to a workman from the negligence of a fellow-servant: *Wigmore v. Jay*, 5 Exch. 354; *Gallagher v. Piper*, 16 C. B. N. S. 669 (E. C. L. R. vol. 111). *366] [WILLES, J.—In *Paterson's Compendium of *English and Scotch law*,—a work always spoken of with the highest commendation,—p. 273, the law of the two countries is said to be the same in this respect.] There was extremely slender evidence that Debor was manager of the defendant's works; and none whatever that the plaintiff was set to this work by Debor. For aught that appeared, the accident was the result of the boy's own mischievous act. [BYLES,

J.—That would be for the jury.] There was no evidence which ought to have been submitted to them.

ERLE, C. J.—I am of opinion that this rule should be made absolute. This is an action to recover damages for an injury sustained by the plaintiff through an explosion of certain combustible materials in the defendant's factory. It appears that the plaintiff, a boy of tender years, was engaged in stirring the mixture in a vessel in the presence of Debor; and, according to the evidence, Debor was clearly guilty of negligence in permitting an inexperienced person to do this, and would have been liable. But the action is brought against Debor's master: and the question for our determination is, whether the master is responsible; the law being clear, that a damage caused to a workman by reason of the negligence of a fellow-workman imposes no liability upon the master. That was very elaborately discussed here in *Gallagher v. Piper*, 16 C. B. N. S. 669 (E. C. L. R. vol. 111), where all the cases are collected, and the rule as to the master's liability for employing incompetent persons or furnishing insufficient materials was very much considered. The question is, whether Debor is to be considered as the vice-principal of the factory. I avoid the word "manager," which is an ambiguous one, and may mean either a person retained generally to represent the principal in his absence, or one who has the superintendence of a *particular contract or job, [*367 in which latter case he would be in no different position from that of a fellow-workman. That was the case of *Gallagher v. Piper*, where the plaintiff had to look to Mahony, the foreman of the scaffolders under Phear, for the necessary materials to construct the scaffolding. Phear, whose omission to supply sufficient materials caused the injury to the plaintiff, was held to stand in the position of a fellow-workman, and not of one who was put to represent the defendants as a vice-principal. Assuming that Debor was the person whose negligence caused this accident, is the master responsible? There was evidence for the jury that Simlack was placed by the defendant in the position of a vice-principal. If the case had rested there, I should have been inclined to think that the verdict ought to stand. The contract for the plaintiff's service was made with Simlack. Debor was a workman whose duty it was to mix the materials which exploded. Was there any evidence to fix the defendant as having put Debor to represent him at the factory? The evidence on the subject is the statement of the plaintiff, who said that Simlack was the foreman of the works; and that, when Simlack was away, Debor took his place. Is that any evidence that Debor was a person appointed to represent the defendant? The only other evidence was, that, at the time the explosion took place, Simlack was not at the factory, and that Debor was. Is that any evidence that Debor had the authority I speak of? For aught that appears, Simlack might have been at another part of the premises at the moment. Upon the whole, I am clearly of opinion that the accident was the result of Debor's negligence, and that he is not shown to have filled any other position in relation to the plaintiff, than that of a fellow-workman.

*WILLES, J.—I am entirely of the same opinion.

BYLES, J.—I also concur with my Lord, and do not think it [*368 is necessary to add anything.

KEATING, J.—I am of the same opinion. There was abundant evidence for the jury of negligence on the part of Debor: but I much doubt whether there was any evidence upon which the jury could reasonably act, to show that he was at the time filling the position of manager or representative of the defendant, the common employer. I put it to the jury whether he was so or not, and they found in the affirmative. But, when carefully looked at, it will be found that the evidence is of the minutest possible description. It did not appear that Simlack, the foreman, was away from the premises at the time, or that Debor was there in charge of them. If he had been left in general charge of the premises, he probably would not have been engaged in mixing the ingredients. There was, upon the whole, I think, no evidence upon which the jury could reasonably act.

Rule absolute to enter a nonsuit.

*869]

*Ex parte ELIZA HALL. April 27.

1. The rule of Michaelmas Term, 1862, as to the form of affidavits on acknowledgments taken under the statute 3 & 4 W. 4, c. 74, is directory only.

2. In re Cooper, 18 C. B. N. S. 220 (E. C. L. R. vol. 114), confirmed.

PULLING, Serjt., moved that the registrar might be directed to receive and file an acknowledgment taken in America under the 3 & 4 W. 4, c. 74, together with the affidavit of the due taking thereof.

The officer had objected to receive the affidavit, on the ground that it was not divided into paragraphs and numbered, nor drawn up in the first person, pursuant to the rule of Michaelmas Term, 1862,—see 13 C. B. N. S. 2 (E. C. L. R. vol. 106).

PER CURIAM.—That rule is directory only, and was intended so to be.

There was a further objection, viz. that the affidavit had not been sworn in exact compliance with the rule of Hilary Term, 14 G. 3. As to this the learned Serjeant referred to Ex parte Mann, 7 Scott 14, In re Cooper, 18 C. B. N. S. 220 (E. C. L. R. vol. 114), and the rule of Hilary Term, 1863, 13 C. B. N. S. 404 (E. C. L. R. vol. 106).

The court, upon the authority of In re Cooper, allowed the documents to be filed, the Lord Chief Justice intimating that “magistrate,” in the rule of Hilary Term, 14 G. 3, meant any person duly authorized to administer oaths at the place where the acknowledgment is taken.

Fiat.

***In re MARY GRAHAM. May 25. [*370**

An order for the conveyance of property by a married woman, under the 3 & 4 W. 4, c. 74, s. 91, will only be made with reference to a contemplated purchase.

BRIDGE, upon an application that Mrs. Graham might be at liberty to convey certain property without the concurrence of her husband, under the 3 & 4 W. 4, c. 74, s. 91, on the ground that he had several years ago deserted her and his residence was unknown,—part only of the property having been agreed to be sold,—asked for an order embracing the remaining part when it should be sold.

ERLE, C. J.—That which you ask has never been done, and it would be highly inconvenient to make an order otherwise than with reference to a contemplated purchase.

BYLES, J.—The words of the 91st section point to some specific case.

The rest of the court concurring

Rule as to the general order refused.

***Ex parte SUSANNAH ANDREWS. June 5. [*371**

Conveyance of separate property by married woman, where living apart by sentence of judicial separation, without alimony, &c.

O'MALLEY, Q. C., moved for a rule under the 3 & 4 W. 4, c. 74, s. 91, to enable Mrs. Susannah Andrews by deed or surrender to dispose of certain property, to which she was entitled under the will of her deceased father, without the concurrence of her husband, on the ground that he was living separate and apart from her by decree of judicial separation pronounced by the Court for Divorce and Matrimonial Causes on the 8th of June, 1864. The affidavit stated that no alimony had been awarded to the lady, that her husband did not contribute anything towards her support, and that he had refused to concur.

PER CURIAM.—All the conditions to entitle Mrs. Andrews to what she asks seem to have been complied with. Fiat.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

AND IN THE

EXCHEQUER CHAMBER,

IN

Trinity Vacation,

IN THE

TWENTY-EIGHTH AND TWENTY-NINTH YEARS OF THE REIGN OF
VICTORIA. 1865.

The Judges who usually sat in Banco in this Term, were,—
WILLES, J., KEATING, J.
BYLES, J., and

COLLES and Others v. EVANSON. *June 19.*

A plea, under the 145th section of the Bankrupt Law Consolidation Act, 1849, to an action for breaches of covenants in a lease,—that the defendant (the lessee) became bankrupt, that the assignees declined to take the lease, and that, within fourteen days after notice thereof, the defendant executed a surrender (under seal) of the demised premises to the lessors, and tendered to them such surrender, and offered to deliver up the possession of the premises to them,—is bad, for not showing the impossibility of a literal compliance with the conditions of the section; as, that the lease was lost or destroyed, or the like.

THE first count of the declaration stated that, by an indenture of lease made between the plaintiffs of the one part, and the defendant of the other part, dated the 9th of March, 1833, the plaintiffs demised and leased to the defendant a certain dwelling-house and *373] *premises, to hold for a term of 1000 years from the 25th of March, 1833, at the rent during the said term of 100*l.* per annum, to be paid by two equal half-yearly payments of 50*l.* each, on every 25th of March and 29th of September in each and every year during the said term, over and above all taxes, charges, and impositions whatsoever (quit-rent, and crown-rent excepted): and the defend-

ant thereby covenanted and agreed to and with the plaintiffs that he the defendant should and would from time to time during the term thereby granted well and truly pay unto the plaintiffs, their heirs and assigns, &c., the said reserved rent of 100*l.* on the said days appointed for the payment thereof as before mentioned, over and above all such taxes, charges, and impositions as aforesaid; and also that he the defendant, his executors, administrators, and assigns, at their own proper costs and charges (but in the joint names of himself or themselves, and of such person as from time to time during the said tenancy they the plaintiffs, their heirs and assigns, or the majority of them, should in writing nominate and appoint, such person being one or other of the said lessors, the plaintiffs, their respective heirs or assigns), should forthwith effect, and thenceforth from time to time and at all times during the continuance of the said term maintain, with the Globe Insurance Company, or any other insurance company to be approved of by the consent in writing first obtained of the majority of them the plaintiffs, their heirs and assigns, some one of the insurance companies having an office in the city of Dublin, as long as there should be such, to be preferred, a policy of insurance whereby and wherein the said thereby demised house, together with all buildings and other insurable erections then or thereafter about to be thereunto added so as to form connected parts thereof, might and should *be insured against any loss by the casualties of fire, to the [*374 amount of 1500*l.* at the least, and wherein and whereby the said thereby demised coach-house, stable, and detached offices, together with all buildings and other insurable erections then or thereafter about to be thereunto added, so as to form connected parts thereof, might and should in like manner be insured against any loss by the casualties of fire to the amount of 200*l.*, both insurances together amounting to the sum of 1700*l.*; and in case that he the defendant, his executors, administrators, and assigns, should leave unpaid the annual sum or other premium necessary to maintain such insurance as aforesaid for the space of twenty-four hours, to be computed, &c., or should not from time to time at the request of them the plaintiffs, their heirs and assigns, produce a receipt or other voucher for the payment of such insurance for the then current year, then it should be lawful for them or any of them the plaintiffs, their heirs or assigns, to pay the same to the insurance company aforesaid, or to any other insurance company as aforesaid, and forthwith double the amount of such insurance premium so to be paid to have, recover, and receive (with all costs consequent upon such payment as aforesaid), of and from him the defendant, his executors and assigns: Averment, that, although the plaintiffs had done all things necessary, and all things and conditions had happened and been performed necessary, and all times had elapsed and passed necessary, to entitle the plaintiffs to have the said covenants performed and observed, and to have the defendant do and perform the several matters and things thereafter alleged not to have been done or performed by him, and to maintain the action for the several breaches and causes of action thereafter mentioned: Breach, that half-yearly payments of the said rent, amounting in the whole to the *sum of 100*l.*, were due and unpaid: and that, [*375 although an insurance against loss by the casualties of fire was

effected by the defendant, or his assigns, with such insurance company as was in the said indenture provided for, and otherwise in accordance with the provision of the covenant in that behalf thereinbefore set forth; yet the defendant and his assigns on two different occasions left unpaid the annual sum or premium necessary to maintain such insurance for the space of twenty-four hours and upwards, computed as aforesaid; and thereupon the plaintiffs, in pursuance of the powers reserved to them by the said indenture in that behalf, on each of the said two occasions paid the amount of such annual sum or premium, amounting on each occasion to the sum of 4*l.* 5*s.*, to the said insurance company, and all things were done and happened, and all times elapsed necessary to entitle the plaintiffs to receive from and be paid by the defendant double the amount of such annual sum or premiums so paid, amounting in the whole to the sum of 17*l.*, but the defendant had not paid the same.

Fourth plea, to the first count,—that, after the making of the said indenture of lease in the declaration mentioned, and before the said half-yearly payments of the rent in the said first breach of the first count in that behalf mentioned respectively became due and payable, and also before the said two annual sums or premiums in the said second breach of the said first count mentioned respectively became due and payable, the defendant, being a debtor within the meaning of, and being subject to, the statutes then in force concerning bankrupts, duly petitioned the court of bankruptcy for the Exeter district (within which district the defendant had resided for the six months next immediately preceding the time of filing such petition) for adjudication of bankruptcy against *himself, and such petition was *376] before the times aforesaid duly filed of record in the said district court of bankruptcy according to the statutes in force in that behalf, and was prosecuted as directed by the act in force in that behalf; that such proceedings were had in the matter of the said petition, that the defendant was before the times aforesaid by the said court duly and according to the statutes in force in that behalf adjudged bankrupt, and an assignee of the defendant's estate and effects was before the times aforesaid duly and according to the said statutes in force in that behalf chosen at the first meeting of the defendant's creditors by a majority in value of the creditors of the defendant who had proved debts, and that the said election of the said assignee was duly and according to the act in force in that behalf accepted by the person so elected, and was confirmed by the said court of bankruptcy; and the said court did, before the times aforesaid, duly and according to the said act in that behalf, by a certificate under the hand of the commissioners and the seal of the court declare the said creditors' assignee to have been duly elected, and appoint him to the said office accordingly: Averment, that all things having been done, and all events having happened, and all times having elapsed, necessary to entitle the defendant to receive his order of discharge according to the act in force in that behalf, the said court duly and according to the said act, and before this suit, made and granted to the defendant an order of discharge according to the statute in force in that behalf; that, after the said appointment of the said creditors' assignee of the estate and effects of the defendant as thereinbefore mentioned, and

before this suit, the said assignee of the estate and effects of the defendant declined to take the said lease in the declaration mentioned, or the benefit thereof; and that *within fourteen days after the defendant had notice that the said assignee had so declined, and [*377 before this suit, he the defendant duly made and executed and delivered a certain deed under his seal, whereby he the defendant surrendered to the plaintiffs the said demised premises, and all the residue of the said term then to come and unexpired therein, and all his the defendant's estate and interest therein, and was then and before this suit ready and willing to, and tendered and offered to deliver the said deed to the plaintiffs, and at the same time offered to deliver up possession of the said premises to the plaintiffs accordingly.

The plaintiffs demurred to this plea, the ground of demurrer alleged in the margin being, "that the plea does not show that the defendant delivered up or offered to deliver up the indenture of lease, or otherwise brought himself within the provisions of s. 145 of the Bankrupt Law Consolidation Act, 1849." Joinder.

Horace Lloyd, in support of the demurrer.(a)—The *defendant does not by his fourth plea bring himself within the 145th [*378 section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106. That section enacts, "that, if the assignees of the estate and effects of any bankrupt having or being entitled to any land either under a conveyance to him in fee or under an agreement for any such conveyance, subject to any perpetual yearly rent reserved by such conveyance or agreement, or having or being entitled to any lease or agreement for a lease, shall elect to take such land or the benefit of such conveyance or agreement, or such lease or agreement for a lease, as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the fiat or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements in any such conveyance or agreement, or lease or agreement for a lease; and, if the assignees shall decline to take such land, or the benefit of such conveyance or agreement, or lease or agreement for lease, the bankrupt shall not be liable, if, within fourteen days after he shall have had notice that the assignees have declined, *he shall deliver up such conveyance or agreement, or lease or agreement for lease, to the person then entitled to the rent, or having so agreed to convey or lease, as the case may be,*" &c. To entitle the bankrupt to the benefit of that section, he must strictly comply with the condition. In *Slack v. Sharpe*, 8 Ad. & E. 366 (E. C. L. R. vol.

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the fourth plea is bad in substance, for not showing that the defendant was in any manner relieved from his obligations under the lease:

"2. That, in order to his being so relieved, it was necessary that the defendant should show by his plea that he had complied with and brought himself within the provisions of the 145th section of the Bankrupt Law Consolidation Act, 1849; and that, on the contrary, the plea shows that he has not done this:

"3. That, in order to comply with and bring himself within the provisions of the before-mentioned section, it was necessary (among other things) that the defendant should actually deliver up the lease or agreement for a lease to the person then entitled to the rent; and that it was not sufficient to make and execute and deliver the deed of surrender mentioned in the said plea, and to offer to deliver such deed of surrender to the plaintiffs, and to offer to deliver up possession of the premises to the plaintiffs."

85), 3 N. & P. 390, it was held that an offer to deliver up possession of the premises, in the case of a parol demise, was a sufficient compliance with the *corresponding section (75) of the 6 G. 4, *879] c. 16. Two subsequent cases, however, have thrown considerable doubt upon the accuracy of that decision. But there is a marked distinction between the case of an unwritten and a written demise. In the former case, unless the bankrupt can release himself by abandoning possession of the premises, he cannot discharge himself at all: but, at all events, *Slack v. Sharpe* does not warrant the notion, that, where there is a deed in existence, as here, anything short of an absolute compliance with the statute will do. In *Briggs v. Sowry*, 8 M. & W. 729, 739, Parke, B., intimates that, but for the case of *Slack v. Sharpe*, he would have been of opinion that the case of an occupation under a parol demise did not fall within the statute, but, that, after the decision of the Court of Queen's Bench in that case, he should be unwilling so to decide, without taking more time to consider the point: and Alderson, B., said that he felt himself bound by the authority of that case, although he did not entirely concur in the reasons assigned by the court for their judgment. In *Maples, app., Pepper, resp.*, 18 C. B. 177 (E. C. L. R. vol. 86), the tenant of premises (under a demise from year to year) was permitted by the landlord to make a communication through the party-wall to an adjoining house, and to make other alterations, upon condition that he should at the termination of his tenancy restore the premises to their original state. Some years afterwards, the tenant became bankrupt, and, shortly after his bankruptcy, the assignees declining to take the premises, gave notice to the landlord that he would deliver up possession of the premises to him under s. 145 of the Bankrupt Law Consolidation Act, 1849: and it was held by this court that the condition or agreement above specified, to restore the premises to *880] their previous state, was not a condition *or agreement within that section. Crowder, J., in giving judgment, said: "But for the case of *Slack v. Sharpe*, and those cases which have followed it, I must own I should have thought the condition, to satisfy that section, must be in some written document: but, at all events, it must be in the lease or agreement." In *Manning v. Flight*, 3 B. & Ad. 211 (E. C. L. R. vol. 24), in covenant for rent, the defendants pleaded, that, before the rent became due, the defendants by deed assigned all their interest in the demised premises to one Barnard, subject to the payment of the rent and performance of the covenants contained in the lease; and that Barnard by the assignment covenanted to pay the rent and perform the covenants contained in the lease; that the defendants delivered the lease to Barnard, and he accepted the same, and entered on the premises by virtue of the assignment: the plea then went on to state that Barnard became bankrupt, and that the arrears of rent accrued after the date of the commission; that the assignees declined the lease; and that the bankrupt, within fourteen days after notice of that fact, delivered up such lease to the plaintiffs, the devisees of the reversion. It was held that this was a bad plea, inasmuch as the statute did not put an end to the lease, but merely discharged the bankrupt from any subsequent payment of the rent

or observance of the covenants. There can be no reason why the section should be extended beyond its language.

Coleridge, Q. C., contra. (a)—The question is, whether, *in order [*381 to satisfy the requirements of the 145th section of the Bankrupt Law Consolidation Act, 1849, the actual paper or parchment must be delivered up. *Slack v. Sharpe* shows that an offer to deliver up possession of the premises is enough where the premises are held by parol: and that case is an authority binding upon this court. A surrender by act and operation of law puts an end to the demise, and extinguishes all rights under the lease, if the premises are held under a lease: see *Grimman v. Legge*, 8 B. & C. 324 (E. C. L. R. vol. 15), 2 M. & R. 438, and many other cases. [BYLES, J.—There is no doubt about that.] The delivery up of the lease, and possession of the premises with it, clearly operates as a surrender by act and operation of law: see *Lyon v. Reed*, 13 M. & W. 285, and the cases referred to in the notes to *Doe v. Oliver*, and the *Duchess of Kingston's Case*, in 2 *Smith's Leading Cases*, 5th edit. 714 et seq. Suppose the lease assigned to a person who had gone to Australia with it. It would be impossible in that case to deliver up the parchment. But, would not a surrender by act and operation of law, and a delivery up or an offer to deliver up possession of the premises, be enough to satisfy the words of the 145th section? [BYLES, J.—The plea alleges the execution of a deed of surrender, a tender of the deed, and an offer to deliver up the possession of the premises.] Yes. The whole legal right is extinguished by what has been done. What more can be necessary? Suppose the defendant had delivered up the lease, but not the actual possession of the premises,—would that be a sufficient compliance with the act? It is submitted that it would not, and yet the words of the section would be satisfied. The words, therefore, are not to be looked at, but the *general scope and object of [*382 the enactment. The plea shows that the defendant has, as far as he could do so, complied with all the substantial requisites of the statute. The surrender operates an extinguishment of the defendant's legal estate. [BYLES, J.—Only if it is accepted. WILLES, J.—*Slack v. Sharpe* shows that there may be a compliance with the statute cy pres. This plea, however, does not allege facts which amount to a compliance cy pres. It is consistent with all that is alleged, that the defendant is keeping the lease in his own possession. He cannot give up a lease which he has assigned. And the plea cannot be helped by an amendment.] It is submitted that enough is shown to constitute a defence.

WILLES, J.—This is an action by the lessors against the lessee for breaches of covenants in a lease under seal, to which there is a plea professedly founded upon the 145th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, stating that the lessee (the defendant) had become bankrupt, that the assignees declined to take

(a) The points marked for argument on the part of the defendant were as follows:—

"That it appears on the face of the plea that the plaintiffs could have had both a surrender and actual possession of the premises, and all the defendant's interest therein:

"2. That delivering a deed of surrender of the whole of the defendant's interest, coupled with a delivery of possession, was equivalent to a delivery up of the lease, within the meaning of the statute."

to the lease, and that, within fourteen days after he had notice that the assignees so declined to take the lease, he executed a deed of surrender of the demised premises to the lessors, and tendered the deed to them, and offered to deliver up to them the possession of the premises. There is no statement that the deed was lost or destroyed, or that any circumstances existed which prevented the bankrupt from giving up the lease to the lessors; and on that ground the plea appears to me to be bad, because the clause of the statute in question, dealing apparently with the case of a lease or agreement for a lease, which seems to imply the creation of the relation of landlord and tenant by a document in writing, gives a discharge to the bankrupt on his giving *383] up the lease or agreement *in writing. If that section requires a literal compliance, and only extends to a lease in writing, it is clear that the bankrupt is not discharged from his covenants unless he hands over to the lessor the document itself. As we are dealing with an exception in the statute, it is not possible for us to say that the bankrupt is discharged by a compliance with the requirements of the section *cy pres*, by showing the impossibility of delivering the lease, and surrendering the actual interest in the term. But the case of *Slack v. Sharpe*, 8 Ad. & E. 366, 3 N. & P. 390, certainly puts a different construction upon the statute; and I am far from saying that that case was not rightly decided. The Court of Queen's Bench there dealt with the 145th section of the Bankrupt Act of 1849 in this way: they held that the object of the statute being to relieve the bankrupt from his debts and engagements, they would give effect to such paramount intention where the interest was created by parol, by saying that the statute was complied with by the bankrupt's giving up the estate created, and the lease or agreement, *if any*, and that, where there was no lease or agreement in writing, the bankrupt might discharge himself by giving up the possession of the subject-matter of the demise. It has been urged on the part of the defendant here that we ought to act upon the authority of that case, and give judgment in favour of the plea, because he has complied with the statute as far as he could, by executing a deed of surrender of the demised premises, and offering to deliver up the possession to the lessors. But, in order to complete that defence founded upon the statute, as explained by the case of *Slack v. Sharpe*, the defendant should have gone on and shown that there was no lease or agreement in writing so that the statute could be literally complied with, as well as a sur- *384] render and offer of the surrender. Here the plea *shows the latter, but not the former. The plea, therefore, fails, for not showing the impossibility of a strict and literal compliance with the statute, by delivering up the lease.

The rest of the court concurring,

Judgment for the defendant

WILLIAM PEARSON, Appellant; JESSE TAZEWELL,
Respondent. *June 24.*

By a local turnpike act (3 G. 4, c. lxxv.), the following tolls (amongst others) were imposed,—

"1. For every horse, &c., drawing any coach, barouche, sociable, berlin, chariot, landau, chaise, calash, chair, phaeton, caravan, taxed-cart, hearse, litter, or other such light carriage (*except stage-coaches*), a sum not exceeding 4½d. :

"2. For every horse, &c., drawing any stage-coach licensed to carry in the whole, inside and outside, not more than nine passengers, a sum not exceeding 4½d. :

"3. For every horse, &c., drawing any stage-coach licensed to carry in the whole, inside and outside, more than nine, and not exceeding sixteen passengers, a sum not exceeding 6d. :

"4. For every horse, &c., drawing any stage-coach licensed to carry in the whole, inside and outside, more than sixteen passengers, a sum not exceeding 8d. :

"5. For every horse, &c., drawing any caravan, tilted-wagon, tilted-cart, or other carriage employed in carrying passengers for a fare, a sum not exceeding 4½d.

"11. For every stage-coach or other public carriage having more passengers than the same is licensed to carry, or having a greater weight of luggage upon the top of the same than is authorized by law, or having passengers riding upon the top of such luggage," double the usual toll.

A subsequent clause provided that no person should pay toll more than once in any one day for passing and repassing with the same horse or horses: and s. 40 provided that the tolls should be payable for or in respect of all stage-coaches and other such public carriages licensed or not licensed, for every time of passing and repassing through the same turnpike on the same day."

A., a carrier, travelled to and from Ashcott and Bridgewater three times a week with a light covered spring van on four wheels, drawn by one horse (for which he paid duty under the 16 & 17 Vict. c. 90, sched. D), which did not travel more than four miles an hour, and which was principally and bonâ fide used for the carrying of goods and merchandise, but occasionally also for conveying passengers for a fare, never more than six:—Held, that he was not liable, under s. 40 of the local act, to return-toll.

At a petty session holden for the borough of Bridgewater, in the county of Somerset, on Monday, the 24th of April, 1865, before, &c., an information preferred by *Jesse Tazewell (hereinafter called the respondent) against William Pearson (hereinafter called the appellant), under s. 55 of the 3 G. 4, c. 126, the General Turnpike Act, charging for that he the appellant then being collector of the tolls at the Bridgewater Eastern turnpike-gate in the said borough of Bridgewater, did on the 18th of April then instant demand and take from the said respondent a greater toll, viz., 4½d., than he was authorized to do under the powers of any act of parliament,—was heard and determined by the justices, the appellant being represented by his attorney; and upon such hearing the said appellant was duly convicted of the said offence; and the justices adjudged him to pay the sum of 4½d., being the toll excessively taken, the sum of 2s. 6d., to be paid and applied according to law, and also to pay to the respondent his costs in that behalf.

The appellant being dissatisfied with the decision, the following case was stated, pursuant to the 20 & 21 Vict. c. 43:—

At the hearing of the aforesaid information, it was proved on the part of the informant, the respondent in this appeal, that he was a common carrier, living at Ashcott, about nine miles from Bridgewater, and travelling to Bridgewater and back three days in each week, with a light covered one-horse spring tilted-van on four wheels, having two movable seats, which could be put up or down as occasion required, with a small entrance in front, and which was principally and bonâ fide used for and in the carrying of goods, wares, or mer-

chandise, whereby he sought his livelihood, but occasionally also used in conveying passengers for hire: and, on cross-examination, he stated that the said tilted-van was capable of conveying as many as six passengers, but the average taken was not more than two; that he charged *386] a fare of 9d. to each *passenger from Ashcott to Bridgewater and vice versa, and smaller fares varying with the distance for passengers over shorter portions of his route; that he did not travel more than four miles an hour; that, on the 18th of April then instant, he passed through Bridgewater Eastern gate, kept by the appellant, on his way to Bridgewater with the said tilted-van and one horse, and produced a ticket denoting payment of the toll of 4½d. at another gate which clears the appellant's gate; that, on his return the same day with the same tilted-van and the same horse, and having no passenger, the appellant demanded from him a back toll of 4½d., on the ground that the said tilted-van was a "stage-coach or other such public carriage," within the meaning of the proviso in the local act hereinafter mentioned, and that he paid it under protest; that the respondent's van is not licensed as a stage-coach, but he pays a duty of 2l. 6s. 8d. under Schedule D. of the 16 & 17 Vict. c. 90, which enacts that duty shall be paid "For every carriage used by any common carrier principally and bonâ fide for and in the carrying of goods, wares, or merchandise, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any license by the commissioners of inland revenue,—where such last-mentioned carriage shall have four wheels, 2l. 6s. 8d."

The tolls imposed by the local turnpike-act, 3 G. 4, c. lxxv. s. 34, are as follows:—

"1. For every horse or other beast drawing any coach, barouche, sociable, berlin, chariot, landau, chaise, calash, chair, phaeton, caravan, taxed-cart, hearse, litter, or other such light carriage (*except stage-coaches*), a sum not exceeding the sum of 4½d.:

*387] "2. For every horse or other beast drawing any *stage-coach* licensed to carry in the whole, inside and outside, not more than nine passengers, a sum not exceeding the sum of 4½d.:

"3. For every horse or other beast drawing any stage-coach licensed to carry in the whole, inside and outside, more than nine, and not exceeding sixteen passengers, a sum not exceeding the sum of 6d.:

"4. For every horse or other beast drawing any stage-coach licensed to carry in the whole, inside and outside, more than sixteen passengers, a sum not exceeding the sum of 8d.:

"5. For every horse or other beast drawing any caravan, tilted-wagon, tilted-cart, or other carriage employed in carrying passengers for a fare, a sum not exceeding the sum of 4½d.:

"11. For every *stage-coach* or other public carriage, having more passengers than the same is licensed to carry, or having a greater weight of luggage upon the top of the same than is authorized by law, or having passengers riding upon the top of such luggage, double the toll otherwise chargeable upon the horses drawing such coach or other carriage."

By the 39th section it is provided "that no person shall be subject

to the payment of toll more than once in any one day for passing and repassing with the same horse or horses through the same turnpike, except as hereinafter mentioned, such person or persons producing a note or ticket denoting the payment of such toll, and which note or ticket the collectors of the tolls are hereby required to deliver gratis on payment of the tolls as hereinafter mentioned."

By the 40th section it is enacted as follows:—"Provided, nevertheless, and be it further enacted, that the tolls shall be payable for or in respect of all *stage-coaches* and other *such* public carriages, *licensed or not *licensed*, for every time of passing and repassing through [*388 the same turnpike on the same day; and that the said tolls shall be payable for or in respect of all post-chaises and other carriages travelling for hire, for passing and repassing through the same turnpike on the same day, upon every time of a new hiring of such post-chaises or carriages last mentioned, on a ticket being produced denoting a new hiring."

It was contended on the part of the defendant, the appellant in the present appeal, that the back toll was legally chargeable, on the ground that the 40th section of the local act must be held to refer to the tolls imposed by the 2d, 3d, 4th, and 5th paragraphs of the 34th section, and not to the 2d, 3d, and 4th only, inasmuch as those three paragraphs contemplated only the case of carriages *licensed* to carry passengers: and that, to confine the liability to back toll to such carriages only, would render the words "licensed or not licensed" meaningless.

The appellant further contended that the respondent's carriage came clearly within the 5th paragraph of the 34th section, as a carriage employed in carrying passengers for a fare: and relied on the case of *Eatwell, app., Richmond, resp.*, 18 C. B. N. S. 364 (E. C. L. R. vol. 114), as an authority that the tolls were chargeable upon that which is the habit of the carriage; and that, as this was a carriage running regularly at stated times, not only for goods, but also for the conveyance of passengers for a fare, it was immaterial whether on any particular occasion there chanced to be a passenger in the carriage at the time of its passing through the gate, provided it was in fact performing one of its regular journeys.

It was also contended, that the part of the 40th section referring to post-chaises, which were only to be liable to toll upon a fresh hiring, supported the same *view; and that the 40th section did not [*389 (as had been suggested) apply exclusively to the tolls imposed by the 11th paragraph, which was in the nature of a penal clause.

The justices being of opinion that the respondent's tilted van was not a "stage-coach or other such public carriage, licensed or unlicensed," within the meaning of the said 40th section of the said local act, but that it was *bonâ fide* a carrier's cart used principally for and in the carrying of goods, whereby the said respondent sought his livelihood, and only occasionally used in conveying passengers for hire, and travelling less than four miles an hour, and being assessed as such under the 16 and 17 Vict. c. 90, and having no passenger on the occasion in question, was not liable to pay back toll, but was entitled to return free on the same day with the same horse, under the 39th section of the local act; and that the assessment of the respondent's tilted-van under the 16 & 17 Vict. c. 90, and the restriction of travel

to four miles an hour by the Stage-Coach Act, prevented it from being classed as a stage-coach or other such public carriage, either licensed or unlicensed; that the term "licensed" applies to coaches properly licensed under the Excise Acts, and the term "unlicensed" to coaches defrauding the revenue by not obtaining such license; whilst in this case the respondent had only a modified license to carry passengers occasionally with his goods; and, the Excise authorities being satisfied, the toll-collector ought to be satisfied also: and that the double toll imposed by the 40th section, being on the vehicle, must have reference to the 11th paragraph of the 34th section; and that the evidence given before them brought the case within the operation of the statute 3 G. 4, c. 126, s. 55: and they gave their determination against the appellant in the manner before stated.

*390] *The question of law arising on the above statement therefore is,—was the respondent liable or not to pay a second or back toll in respect of his tilted-van with the same horse returning the same day without any passenger, under the terms of the said 40th section of the said local act. The opinion of the court was thereupon asked on the said question of law, whether or not the justices were correct in their determination as aforesaid, and as to what further should be done or ordered by the said court in the premises.

Campbell Forster, for the appellant, submitted that the respondent was liable to the return-toll under the 40th section of the local act, even though he was not actually carrying any passenger at the time of returning, the vehicle being a "stage-coach," and its habit being to carry passengers for a fare. He referred to *Eatwell*, app., Richmond, resp., 18 C. B. N. S. 364 (E. C. L. R. vol. 114), and *Comley*, app., Carpenter, resp., 18 C. B. N. S. 397; and further submitted that the words "not licensed," in s. 40, meant, not required to be licensed under the Stage Carriage Act, 2 & 3 W. 4, c. 120.

No one appeared on behalf of the respondent.

Cur. adv. vult.

WILLES, J.—No counsel appearing for the respondent in this case, the court took time to consider, in order to compare the case of *Eatwell*, app., Richmond, resp., with a subsequent case of *Comley*, app., Carpenter, resp., which had not at the time of the argument of this case been published. In the former, the court held, upon the construction of a clause in the local act (10 G. 4, c. cx.) which imposed the return toll in respect of the horses drawing "any stage-coach, stage-wagon, *van, or other stage-carriage for the conveyance of passengers for payment, hire, or reward," that the carrier's van, usually employed in carrying goods, though occasionally carrying passengers also for hire, was not liable for such return-toll. In the second case, the carrier in like manner travelled with a van in which he principally carried goods for hire, but sometimes passengers also, and it was held that he was liable, upon the words of a clause in the local act (6 G. 4, c. cxliii.), which imposed the return-toll in respect of horses drawing "any stage-coach, diligence, van, caravan, or stage-wagon, or other stage-carriage conveying passengers or goods for pay or reward." In neither of these cases was the carrier's vehicle licensed under the Stage-Carriage Act, 2 & 3 W. 4, c. 120, but in both the carrier paid duty, as here, under the 16 & 17 Vict. c. 90, Sched. D.: and in each

case the decision turned on the construction of the particular words in the local act. The present case arises upon an act of parliament the terms of which are neither like those of the act in *Eatwell, app., Richmond, resp.*, nor like those in *Comley, app., Carpenter, resp.* The words of the clause imposing the return-toll here are,—“The tolls shall be payable for or in respect of all *stage-coaches*, and other such like carriages, *licensed or not licensed*, for every time of passing and repassing through the same turnpike on the same day.” It was contended on the part of the appellant that the words “not licensed,” in s. 40, meant not required to be licensed by the 2 & 3 W. 4, c. 120, and therefore that this vehicle, which is one which does require a license, was chargeable with return-toll. On the other hand, it was urged before the magistrates that “such” must mean of the same sort as stage-carriage, that is, a vehicle the primary object or use of which was to carry passengers for a fare. The magistrates yielded to the latter argument; and it must be taken that they found the van in question was not liable to toll because its habit was not to carry passengers for a fare, but that that was only the occasional use of the vehicle. On this ground they held that it was not such a public carriage as a stage-coach, and therefore not chargeable with return-toll. Upon consideration, we think that the most convenient construction of the statute, and that their decision must be affirmed.

BYLES, J.—I am of the same opinion. The 39th section enacts that no person shall be subject to the payment of toll more than once in any one day for passing and repassing with the same horse or horses through the same turnpike, except as thereafter mentioned. One thing is plain, that everybody is exempt from toll, except he be by the act of parliament clearly declared liable. Section 40 provides that the toll shall be payable in respect of all stage-coaches or other such public carriages, *licensed or not licensed*, for every time of passing and repassing through the same turnpike on the same day. The carriage in question is not a “stage-coach.” But it is a public carriage. Is it *such* a public carriage as a stage-coach? It is a vehicle paying duty as a carrier’s van, and principally and *bonâ fide* used for and in the carrying of goods, wares, and merchandise, but occasionally also used in conveying passengers for hire. The licenses required for the two descriptions of vehicle are different. In no view of the case,—whether looking at the ordinary employment of the vehicle, or at its authorization,—is this, in my judgment, such a public carriage as the return-toll was intended to be imposed upon.

Decision affirmed.

*HUGHES v. PALMER and Others. June 19. [*398

1. By a composition deed under the 192d section of the Bankruptcy Act, 1860, the debtor and the defendants as his sureties jointly and severally covenanted with the plaintiff as trustee for the creditors, to pay to him so much as would suffice to pay a composition of 7s. 6d. in the pound to all the creditors, by three instalments of 2s. 6d. each, at four, eight, and twelve months; and the deed contained a proviso, that, “in case default should be made in payment of any or either of the said instalments, or in case before the said composition should be fully paid to the trustee, the debtor should be adjudicated bankrupt, or make or attempt to make any assignment of his estate for the benefit of his creditors, or any arrangement with his creditors different to

that arrangement, then and in every such cases those presents, and the release, and every other clause and provision therein contained, should be thenceforth at an end and void."

In an action against the sureties to recover the second instalment,—the principal debtor having been adjudicated bankrupt on his own petition:—Held, that the bankruptcy did not render the deed void as against the sureties, but that the proviso made it voidable, at the election of the creditors.

2. By whom the election in such a case was to be exercised,—*quære?*

THIS was an action for breach of covenant; and by the consent of the parties, and by a judge's order, according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court, without any pleadings:—

Thomas Hatchard Palmer, being indebted to divers persons in divers sums of money, an indenture made between him the said Thomas Hatchard Palmer of the first part, the defendants of the second part, the plaintiff of the third part, and the creditors of the said Thomas Hatchard Palmer of the fourth part, was executed as their deed by the said Thomas Hatchard Palmer and by the defendants, and by the requisite number of creditors within the Bankruptcy Act. The following is a copy of the indenture:—

"This indenture made the 8th of June, 1864, Between Thomas Hatchard Palmer, of, &c., of the first part, George Josiah Palmer, of, &c., George Josiah Palmer the younger, of, &c., Charles Henry James, of, &c., and the Rev. S. W. Maugen, of, &c., of the second part, and William Hughes, of, &c., of the third part, and the several persons, companies, and partnership firms who are creditors of the said Thomas Hatchard Palmer (hereinafter called "the said creditors"), of the fourth part: Whereas, the said T. H. Palmer, being indebted to divers persons in divers sums of money *which he is unable to pay
*394] in full, has proposed to the said creditors to pay to them respectively a composition of 7s. 6d. in the pound upon the amount and in full discharge of their respective debts, such composition to be paid to the said William Hughes as a trustee on behalf of the said creditors, in three equal instalments of 2s. 6d. each, in manner following, that is to say, the first instalment to be paid at or before the expiration of four calendar months after the registration of the deed to be prepared to carry out the said proposal under the 192d section of the Bankruptcy Act, 1861; the second instalment to be paid at or before the expiration of eight calendar months after the registration of the said deed; and the third instalment to be paid at or before the expiration of twelve calendar months from the registration of the said deed,—the payment of such instalments to be secured by the said parties hereto of the second part as sureties for the said T. H. Palmer: And whereas, in order to carry out the said proposal, the several parties hereto have agreed to execute these presents with such covenants and clauses as are hereinafter contained: Now, this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the premises, they the said parties hereto of the first and second parts, do and each and every of them doth hereby, for himself, his heirs, executors, and administrators, jointly and severally covenant and agree to and with the said William Hughes, his executors and administrators, that they, or some of them, their or some or one of their executors or administrators, shall and will pay unto the said William Hughes, his executors or administrators, the sums hereinafter mentioned, at the

times hereinafter stated, that is to say, such a sum of money as will be sufficient to pay all the creditors of the said T. H. Palmer the sum of 2s. 6d. in the pound *on the respective amounts of their said [*395 debts at or before the expiration of four calendar months after the date of the said registration of these presents, and the like sum at or before the expiration of eight calendar months after the said registration of these presents, and the like sum at or before the expiration of twelve calendar months after the said registration of these presents: And this indenture further witnesseth, and it is hereby agreed and declared between and by the several parties hereto, that the said William Hughes shall stand possessed of the said sums of money so to be paid into his hands as aforesaid, upon trust from time to time, and as and when the same shall be received by him, to apply and distribute the same in payment to himself and the rest of the said creditors respectively of the said instalments of the said composition: And this indenture further witnesseth, that, in further pursuance of the said agreement, and in consideration of the premises, the said creditors do hereby severally, for themselves and their respective heirs, executors, administrators, and successors, release and discharge the said T. H. Palmer, his executors and administrators, and his estate and effects, from the debts, claims, and demands of the said creditors respectively, and from all actions, suits, or other proceedings for or in respect of such debts, claims, and demands, or any of them: Provided always, and it is hereby agreed and declared, that, although, as between the said T. H. Palmer and the said parties hereto of the second part, they the said parties hereto of the second part are sureties only for the payment of the said composition, nevertheless, as between them the said parties hereto of the second part and the said creditors, they the said parties hereto of the second part shall be deemed and taken to be principal debtors, so that they the said parties hereto of the second part *shall not be discharged from their, either or any of their [*396 liability by reason of time being given to, or any arrangement being made with, the said T. H. Palmer, without the consent of them the said parties hereto of the second part, or by reason of any other circumstance which would or might have the effect of discharging them, any or either of them, if they were sureties only: Provided always, and it is hereby agreed and declared that these presents shall not in any way prejudice or affect the rights or remedies of any of the said creditors against any surety or sureties, or any person or persons other than the said T. H. Palmer, his heirs, executors, and administrators, nor shall these presents in anywise prejudice or affect any security which any of the said creditors may have or claim for his debt: but, nevertheless, if such security shall be enforceable against the said T. H. Palmer or his estate or effects, then and in that case such creditor (unless he shall consent to abandon his said security) shall be entitled to receive the said compensation upon so much only of his said secured debt as may remain after such security shall have been realized, or after credit shall have been given for the full value thereof, such value to be fairly agreed upon between such secured creditor and the said T. H. Palmer, or in case of dispute to be ascertained by two impartial valuers, one to be chosen by such secured creditor and the other by the said T. H. Palmer, or an umpire to be

named by such valuers before proceeding to the valuation: Provided always, and it is hereby agreed and declared, that, in case default shall be made in payment of any or either of the said instalments of the said composition, or any part thereof, or in case, before the said composition shall be fully paid to the said William Hughes as aforesaid, the said T. H. Palmer shall be adjudicated bankrupt, or make or *397] attempt to make any assignment *of his estate for the benefit of his creditors, or any arrangement with his creditors different to this present arrangement, then and in any such cases these presents, and the release, and every other clause and provision herein contained, shall be henceforth at an end and void (but without prejudice to any act which may have been done by the said trustee under these presents); and the said creditors shall thenceforth be at liberty to sue for or prove for the full amount of their respective debts, less the amount which may have been received by them on account thereof under these presents or otherwise: And it is hereby lastly agreed and declared that these presents are intended to and shall so far as they lawfully may operate as a composition-deed for the benefit of all the creditors of the said T. H. Palmer within the meaning of the provisions of the 192d section of the Bankruptcy Act, 1861, in that behalf. In witness," &c. [Here followed a schedule containing the names of the several creditors, with the amount of their respective debts.]

The said indenture was within twenty-eight days from the time of its execution by the said T. H. Palmer, that is to say, on the 6th of July, 1864, registered in the court of bankruptcy, under the 192d section of the Bankruptcy Act, 1861.

The first instalment under the said indenture was paid.

Afterwards, and before the second instalment became due, and before it was paid, viz., on the 27th of February, 1865, the said T. H. Palmer, *on his own petition*, was adjudicated bankrupt.

This action is brought for non-payment of the second instalment according to the covenant contained in the said indenture, the day for the payment of which elapsed before the commencement of this action.

*398] The said creditors have never, nor has any one of *them elected to treat the said indenture as void; nor have they, nor has any one of them, sued for or proved for the full amount of the unpaid portions of their or his debts or debt.

After the said adjudication, and before this action, most of the creditors, including the plaintiff, one of them, met and resolved that they did not treat the said indenture as void, and that they held the defendants jointly and severally liable to pay the balance of the said composition, pursuant to the said covenant.

The following is a copy of the resolution, that is to say,—“That the creditors who executed the said deed, or who may be bound thereby, in pursuance of the Bankruptcy Act, 1861, do not treat such deed of composition as void against the sureties parties thereto of the second part; but that they hold them jointly and severally liable to pay the balance of the composition, pursuant to the covenant on their part contained in such deed.”

The court were to draw any conclusion of fact which they might think a jury ought to draw from the premises.

The question for the court was, whether the defendants were by

the facts discharged from liability on the covenant to pay the second of the said instalments.

If the court should answer the question in the affirmative, judgment was to be entered for the defendants by nolle prosequi, with costs of defence. If the court should answer the question in the negative, judgment was to be entered for the plaintiff, for 130*l.*, or such a sum, to be ascertained by one of the Masters of this court, or in such other manner as the court might direct, should be paid by the defendant to the plaintiffs, together with costs of this action and special case; and that no writ of error or other proceedings should issue or be taken by either party.

**Anstie*, for the plaintiff.(a)—The proviso in question is inserted for the benefit of the creditors. The defendants are [*399 seeking to set up the very contingency on which they were to become liable as sureties, viz., the non-payment of the instalments, to defeat the claims of the creditors under the deed. The proviso, it is submitted, renders the deed voidable only at the election of the creditors. In *Hyde v. Watts*, 12 M. & W. 254, a similar question arose upon an indenture by which the defendant covenanted to pay to S. and H., as trustees for the creditors, 500*l.* for each of the three successive years next after the 1st of January then next, and that he would forthwith insure his own life in some assurance office in London or Westminster in 1500*l.*, and would continue the same so insured during the said three years; with a proviso, that, in case of the defendant's neglect or refusal to effect or keep on foot such policy of assurance on his own life, then, in either of those cases, *the indenture was to be utterly void to all intents and purposes whatsoever*: and it was held, that, by the defendant's neglect to keep alive the policy, the indenture was not absolutely void as to all the parties to it, but merely void as to the plaintiff and others, *if they should elect to make it so*. Parke, B., in delivering the judgment of the court, says: "The material question in the cause was, whether the deed, in case of a neglect to effect or keep alive a policy on his own life for 1500*l.*, was absolutely void as to all [*400 the *parties, and incapable of being confirmed, or only void as against the plaintiff, if he should so elect. Our opinion is, that the latter is the true construction, by reason of the absurd consequences which would follow, if the defendant, against the consent of the parties, who had all an interest in the continuance of the indenture, and to whom it gave benefit as well as to the defendant, could avail himself of his own wrong, and absolve himself and the trustees from liability on their respective covenants." There, as here, the proviso was introduced for the benefit of the persons with whom the covenant was entered into, and they only could take advantage of a breach. In *Doe d. Bryan v. Banks*, 4 B. & Ald. 401 (E. C. L. R. vol. 6), a lease of coal-mines reserved a royalty rent for every ton of coals raised, and contained a proviso that the lease should be void to all intents and purposes if the tenant should cease working at any time

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That upon the true construction of the proviso in the deed set forth in the special case, the deed was voidable merely at the election of the creditors, and not void upon the happening of any of the events therein mentioned and contemplated:

"2. That such proviso was inserted in the said deed for the benefit of the creditors."

named by such valuers before proceeding to the valuation: Provided always, and it is hereby agreed and declared, that, in case default shall be made in payment of any or either of the said instalments of the said composition, or any part thereof, or in case, before the said composition shall be fully paid to the said William Hughes as aforesaid, the said T. H. Palmer shall be adjudicated bankrupt, or make or *397] attempt to make any assignment *of his estate for the benefit of his creditors, or any arrangement with his creditors different to this present arrangement, then and in any such cases these presents, and the release, and every other clause and provision herein contained, shall be henceforth at an end and void (but without prejudice to any act which may have been done by the said trustee under these presents); and the said creditors shall thenceforth be at liberty to sue for or prove for the full amount of their respective debts, less the amount which may have been received by them on account thereof under these presents or otherwise: And it is hereby lastly agreed and declared that these presents are intended to and shall so far as they lawfully may operate as a composition-deed for the benefit of all the creditors of the said T. H. Palmer within the meaning of the provisions of the 192d section of the Bankruptcy Act, 1861, in that behalf. In witness," &c. [Here followed a schedule containing the names of the several creditors, with the amount of their respective debts.]

The said indenture was within twenty-eight days from the time of its execution by the said T. H. Palmer, that is to say, on the 6th of July, 1864, registered in the court of bankruptcy, under the 192d section of the Bankruptcy Act, 1861.

The first instalment under the said indenture was paid.

Afterwards, and before the second instalment became due, and before it was paid, viz., on the 27th of February, 1865, the said T. H. Palmer, *on his own petition*, was adjudicated bankrupt.

This action is brought for non-payment of the second instalment according to the covenant contained in the said indenture, the day for the payment of which elapsed before the commencement of this action.

*398] The said creditors have never, nor has any one of *them elected to treat the said indenture as void; nor have they, nor has any one of them, sued for or proved for the full amount of the unpaid portions of their or his debts or debt.

After the said adjudication, and before this action, most of the creditors, including the plaintiff, one of them, met and resolved that they did not treat the said indenture as void, and that they held the defendants jointly and severally liable to pay the balance of the said composition, pursuant to the said covenant.

The following is a copy of the resolution, that is to say,—“That the creditors who executed the said deed, or who may be bound thereby, in pursuance of the Bankruptcy Act, 1861, do not treat such deed of composition as void against the sureties parties thereto of the second part; but that they hold them jointly and severally liable to pay the balance of the composition, pursuant to the covenant on their part contained in such deed.”

The court were to draw any conclusion of fact which they might think a jury ought to draw from the premises.

The question for the court was, whether the defendants were by

the facts discharged from liability on the covenant to pay the second of the said instalments.

If the court should answer the question in the affirmative, judgment was to be entered for the defendants by nolle prosequi, with costs of defence. If the court should answer the question in the negative, judgment was to be entered for the plaintiff, for 130*l.*, or such a sum, to be ascertained by one of the Masters of this court, or in such other manner as the court might direct, should be paid by the defendant to the plaintiffs, together with costs of this action and special case; and that no writ of error or other proceedings should issue or be taken by either party.

**Anstie*, for the plaintiff.(a)—The proviso in question is [*399 inserted for the benefit of the creditors. The defendants are seeking to set up the very contingency on which they were to become liable as sureties, viz., the non-payment of the instalments, to defeat the claims of the creditors under the deed. The proviso, it is submitted, renders the deed voidable only at the election of the creditors. In *Hyde v. Watts*, 12 M. & W. 254, a similar question arose upon an indenture by which the defendant covenanted to pay to S. and H., as trustees for the creditors, 500*l.* for each of the three successive years next after the 1st of January then next, and that he would forthwith insure his own life in some assurance office in London or Westminster in 1500*l.*, and would continue the same so insured during the said three years; with a proviso, that, in case of the defendant's neglect or refusal to effect or keep on foot such policy of assurance on his own life, then, in either of those cases, *the indenture was to be utterly void to all intents and purposes whatsoever*: and it was held, that, by the defendant's neglect to keep alive the policy, the indenture was not absolutely void as to all the parties to it, but merely void as to the plaintiff and others, *if they should elect to make it so*. Parke, B., in delivering the judgment of the court, says: "The material question in the cause was, whether the deed, in case of a neglect to effect or keep alive a policy on his own life for 1500*l.*, was absolutely void as to all [*400 the *parties, and incapable of being confirmed, or only void as against the plaintiff, if he should so elect. Our opinion is, that the latter is the true construction, by reason of the absurd consequences which would follow, if the defendant, against the consent of the parties, who had all an interest in the continuance of the indenture, and to whom it gave benefit as well as to the defendant, could avail himself of his own wrong, and absolve himself and the trustees from liability on their respective covenants." There, as here, the proviso was introduced for the benefit of the persons with whom the covenant was entered into, and they only could take advantage of a breach. In *Doe d. Bryan v. Banks*, 4 B. & Ald. 401 (E. C. L. R. vol. 6), a lease of coal-mines reserved a royalty rent for every ton of coals raised, and contained a proviso that the lease should be void to all intents and purposes if the tenant should cease working at any time

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That upon the true construction of the proviso in the deed set forth in the special case, the deed was voidable merely at the election of the creditors, and not void upon the happening of any of the events therein mentioned and contemplated:

"2. That such proviso was inserted in the said deed for the benefit of the creditors."

two years. After the working had ceased more than two years, the lessor received rent: and it was held that a tenancy from year to year was not thereby created; for, the lease was not absolutely void by the cesser to work, but voidable only at the option of the lessor, and that he might avoid the lease upon any cesser to work commencing two years before the day of the demise in the ejectment. "The true construction," says Bayley, J., "of the proviso in this lease, 'that it shall be null and void to all intents and purposes upon a cesser of two years,' is, that it shall be voidable only at the option of the lessor, and that it does not lie in the mouth of the lessee, who has been guilty of a wrongful act, in omitting to work in pursuance of his covenant, to avail himself of that wrongful act, and to insist that thereby the lease has become void to all intents and purposes." *Roberts v. Davey*, 4 B. & Ad. 664 (E. C. L. R. vol. 24), is to the same effect, the judgment *401] being founded upon *Doe d. Bryan v. Bancks*. In *Arnsby v. Woodward*, 6 B. & C. 519 (E. C. L. R. vol. 17), 9 D. & R. 536 (E. C. L. R. vol. 22), a lease contained a proviso, that, if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, then the term thereby granted, or so much thereof as should be then unexpired, should cease, determine, and be wholly void, and it should be lawful to and for the landlord upon the demised premises wholly to re-enter, and the same to hold to his own use, and to expel the lessee: and it was held that this, in the event of a breach of covenant, made the lease voidable, and not void, that the landlord was bound to re-enter in order to take advantage of the forfeiture, and that he waived it by a subsequent receipt of rent. *Pennington v. Cardale*, 3 Hurlst. & N. 656, is an authority to the same effect. It was there held that leases granted by deans and chapters for long terms of years, not in conformity with the disabling and restraining statutes, are not void, but voidable only.

J. Brown, Q. C., contra.(a)—This is an action against the sureties in a composition deed, at the suit of the trustee: and the answer set up, is, that the deed contains a stipulation that, in case default should be made in payment of any or either of the instalments of the composition, or any part thereof, or in case before the composition should be fully paid to the trustee, the debtor should be adjudicated bankrupt, or make or attempt to make any assignment of his estate for the *402] benefit of his creditors or any arrangement with his creditors different to that present arrangement, then and in any such cases those presents, and the release, and every other clause and provision therein contained, should be thenceforth at an end and void. In the cases cited, the party was setting up his own wrongful act. The effect of a bankruptcy would be, to take away from the sureties the bankrupt's means of indemnifying them, and destroy the equality of contribution which it is the object of these composition deeds to secure. The filing a petition by the debtor is not a wrongful act. It is a legal proceeding, and in many cases the most honest thing a man

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the bankruptcy of the said Thomas H. Palmer, as stated in the case, discharged the defendants from their covenant, and avoided the deed:

"2. That the election of the creditors was immaterial, and that it was not a case of election; and that, if it was, the whole of the creditors should have joined in it."

can do, as it prevents his whole estate from being swept away by one creditor. [KEATING, J.—What operation could this deed have against the sureties, if your argument be well founded?] It would operate against them if the debtor made default in payment of an instalment at the day. The reason why leases granted by deans and chapters for long terms, and not in conformity with the disabling and restraining statutes, are held to be voidable only, is, that the statutes were made for the benefit of the chapter, and not for that of the lessee: see *The Lincoln College Case*, 3 Co. Rep. 60 a. This, however, is a totally different case.

Anstie, in reply.—There is no foundation for the distinction suggested between this case and those of the mining leases. The proviso which the defendants are seeking to avail themselves of was evidently put in for the purpose of protecting the creditors against the consequences of the non-performance of the debtor's covenants. He could not be made a bankrupt by any of the creditors parties to the deed: they have released their debts. If he were adjudged a bankrupt at all, it could only be at the instance of a new creditor or upon *his own petition. The argument on the part of the defend- [*403 ants is groundless, unless the covenant could be split; and for that there is no authority.

WILLES, J.—I am of opinion that our judgment in this case should be for the plaintiff. This is an action brought to recover the second instalment of a composition under a deed made between one T. H. Palmer of the first part, the defendants of the second part, the plaintiff of the third part, and the several creditors of T. H. Palmer of the fourth part, by which T. H. Palmer and the defendants jointly and severally covenanted with the plaintiff to pay to him such a sum as would suffice to pay a composition of 7s. 6d. in the pound on the amount of the respective debts of all his creditors, by three instalments of 2s. 6d. each, at four, eight, and twelve months, and by which the defendants agreed, that, though they were sureties only for the payment of the composition, they should as between them and the creditors be deemed and taken to be principal debtors; and by which deed, in consideration of that arrangement, the creditors agreed to release T. H. Palmer from their several debts, claims, and demands, subject to a condition upon which the question we have to determine turns, viz. that, in case default should be made in payment of any or either of the said instalments of the said composition, or any part thereof, or in case, before the said composition should be fully paid to (the plaintiff) the trustee, the said T. H. Palmer should be adjudicated bankrupt, or make or attempt to make any assignment of his estate for the benefit of his creditors, or any arrangement with his creditors different to that arrangement, then and in any such cases those presents, and the release, and every other clause and provision therein contained, should be thenceforth at an end and void (but without prejudice to any act *which might have been done by [*404 the said trustee under those presents), and the said creditors should thenceforth be at liberty to sue for or prove for the full amount of their respective debts, less the amount which might have been received by them on account thereof, under those presents or otherwise. It appears that the first instalment was duly paid, and

afterwards, and before the second instalment became due, T. H. Palmer was adjudicated a bankrupt upon his own petition. The defendants being afterwards called upon to pay the second instalment, the answer they set up is, that the condition has become operative, and the deed void as against them, and they are discharged from their covenant to pay any instalment subsequently due. The question is whether that is the true effect of the condition. For the purpose of determining that question, we must take the whole of the proviso into our consideration, and ascertain its true character,—whether the parties have expressed an intention that the deed shall be absolutely void as to all parties thereto on the happening of either of the events referred to, or whether it is a condition on which the deed is to become voidable only as against such of the parties as may be guilty of a default, and that the remedies in favour of those who have committed no default should be preserved; according to the familiar doctrine of the power of re-entry by a landlord on the tenant, in which case the condition, however strong the words, in modern times at least has always been construed to mean that the lease shall be void only on the lessor electing to take advantage of the forfeiture. These cases come within a class of cases which are founded on the principle of giving effect to the language according to the whole scope of the instrument, without regard to particular words which would seem to point to a contrary intention. Now, looking at the whole of this *405] instrument, it is manifest that the parties intended that one of them should have a particular benefit, subject to its becoming forfeited on his making default, and that “void” here means voidable, as against the party who is in no default. Many familiar instances might be given to illustrate this branch of the law. The condition may be that the instrument shall become void on the doing of some indifferent act by either party, as, that the term shall be ended upon either the lessor or lessee giving six months’ notice to the other of his intention to put an end to it at the expiration of the first seven or fourteen years. There, no wrong is done; and it is obviously the intention of the parties that the term should come to an end, if done by either of them. Then, put the case of a default in payment of rent: the words of the proviso in that case are mere *verba sonantia*. So, of the covenants to repair, and to insure, and so forth. To say that the lease should become absolutely void upon default made by the tenant, would involve two absurd consequences,—one, that the lease should be put an end to by the default of one of the parties, without the consent of the other,—secondly, that it would involve the absurdity not only that the lessee should be relieved from the future performance of the covenants, but also that the lessor should lose the benefit of his remedy for breaches occurring before the lease was so put an end to. These considerations have induced the courts to decide that “void” in all these cases means voidable only at the election of the party not in default. I may notice, that, amongst the terms on which such a condition is to operate, one is not infrequently introduced, viz. that, if the lessee shall become insolvent or be adjudicated bankrupt, the lease shall be void. The question has arisen where the tenant had been adjudicated bankrupt upon

insufficient materials. As to this, the law is *not without [*406 abundant light. The present case gives rise to a question upon another branch of the law, upon which it is not my intention to express any opinion, viz. that which deals with the case of several persons jointly interested having an election to put an end to the deed. The present case differs from the case I put during the argument, of several persons jointly interested in a reversion; for, here, the defendants have several interests; and all have agreed to be represented by the trustee named in the deed: I therefore pronounce no opinion as to what would amount to a determination of the election in such a case. I will content myself with referring to Co. Litt. 145 a, where it is laid down, that, when election is given to several persons, there the first election made by any of the persons shall stand. I see no difficulty in applying that doctrine here. Whether, as the deed is intended to operate under the Bankruptcy Act, the statutory majority ought to elect, or whether one creditor may elect on behalf of all, I do not say. If there be a difficulty, the parties have created it for themselves. That point, however, has no material bearing on the language now before us. Having compared the case of a lease with a similar condition with this, I should have thought that enough to dispose of the question. There is, however, a further argument applicable to the present case. It is provided that the deed is to come to an end on failure of the debtor in payment of any one of the instalments. Having regard to the principles laid down in the cases cited by Mr. Anstie, I think it is impossible to contend that the deed was void simply by reason of such default on the part of the debtor in payment of the second instalment. Applying the ordinary rules of construction and good sense to this proviso, you have here a covenant for making void the deed in case of the bankruptcy of one of the contracting parties, which *in the case of a lease has been [*407 decided to make the demise void only at the election of the lessor, coupled with a covenant which can only be applicable where the creditors elect to declare the deed void. I would make this further remark. Mr. Brown has argued that this condition is severable, and that there is a case within the condition in which the deed must be void, without further election by the creditors; that is, where one creditor causes the condition to be broken, viz. the case of Palmer, the debtor, being adjudicated bankrupt at the suit of a creditor. That is open to two answers. In the first place, no such event can arise, so long as Palmer fulfils the covenants on his part contained in the deed: and, in the next place, if it could, it would only be on a creditor's taking proceedings which are inconsistent with the deed. That argument, therefore, appears to me to fail on both grounds. I must own that the arguments urged on the part of the plaintiff have satisfied me that the true construction of this condition or this proviso, is, that the deed is voidable only at the election of the creditors, and consequently that our judgment must be for the plaintiff.

BYLES, J.—I am of the same opinion. There are cases innumerable to show that "void" may mean "voidable" or "void," at the election of the party contracted with, where otherwise the wrongful act of the other party would put an end to the covenant. No doubt, the words here are strong enough to render the deed void in certain

events. But they are not so strong as were the words in *Roberts v. Davey*, 4 B. & Ad. 664 (E. C. L. R. vol. 24): there they were "null and void to all intents and purposes whatsoever;" and the court, in regarding the real intention of the parties, did violence to the language they had used. It is past controversy here, *indeed it was *408] admitted, that "void" must mean voidable so far as the non payment of the instalments is concerned. The bankrupt and his sureties covenant to pay the instalments, with a proviso, that, in case of default, the deed, that is, the release, shall be void. That beyond all doubt must mean voidable at the election of the creditors. Some of the acts contemplated are acts to which the debtor may or may not be a party: but the covenant must be read in the same sense in either event. The plain intention of the parties was, that the creditors should not be bound by their release unless the instalments were paid. I think it is impossible to read the word "void" any otherwise than as voidable at the election of the creditors.

KEATING, J.—I am entirely of the same opinion. My two learned Brothers have gone so fully into the matter, that there is little left for me to say. To accede to the argument of Mr. Brown, would be to defeat that which was the evident intention of the parties.

Judgment for the plaintiff.

*409] *BUTTERWORTH v. BROWNLOW and Another. *June 19.*

A., a carrier between Hull and the continent, employed B. as his agent to carry goods between Hull and Manchester, the course of business being to deliver the goods to the consignee immediately on their arrival. C., a customer, requested B. not to deliver goods consigned to him, but to send him notice of their arrival, and await his orders. To this B. assented, A. being ignorant of the arrangement. A quantity of cotton-waste consigned to C. from Lille arrived at Hull and was forwarded thence to Manchester by B.; but B. omitted to give C. notice of its arrival, and C. in consequence sustained loss:—Held, that A. was not responsible.

THIS was an action brought to recover the sum of 22l. 8s. 6d., the value of three bags of cotton-waste which were on the 7th of September last delivered by the plaintiff's agent at Lille to the defendants' agents there, for carriage to and delivery to the plaintiff at Manchester.

The plaintiff is a cotton-waste dealer at Manchester; and the defendants, whose place of business is at Hull, undertake to carry from Lille and other places on the continent of Europe to Manchester, Liverpool, and other places in the United Kingdom, at certain through rates of carriage, of which they publish a tariff. They carry principally by means of other carriers, with whom they make their own arrangements; they themselves, however, making the contract of carriage with the customer on their own account as principals.

The plaintiff, who imports considerable quantities of waste from Lille and that part of the continent, has dealt with the defendants from time to time for some years.

On the 20th of October, 1862, some time after he commenced dealing with them, he wrote them the following letter:—

"Gentlemen,—In future, all goods coming into your hands for me you will please consign them through Messrs. Carver & Co., Lanca-

shire and Yorkshire Railway, not by Sheffield and Lincolnshire rail. Your attention will oblige."

The defendants usually employ a firm of carriers called Thompson, McKay & Co. (who make use of the Manchester, Sheffield, and Lincolnshire Railway), *to carry their goods from Hull to Manchester: but, at the plaintiff's request contained in the above letter [*410 (the terms of Carver & Co. and Thompson, M'Kay & Co. being, as far as the defendants were concerned, the same), the defendants afterwards forwarded the plaintiff's goods to Manchester by Carver & Co., the firm of carriers mentioned in the said letter, and who used the Lancashire and Yorkshire Railway.

It was proved, that, in the ordinary course of business, and in the absence of any special instructions to the contrary, Carver & Co., or any other carriers at Manchester, would immediately on the arrival of the goods at Manchester, and without any previous advice of such arrival, deliver them at the warehouse of the person to whom they were directed.

Some time ago the plaintiff gave instructions to Messrs. Carver & Co., that, when goods arrived in Manchester directed to him, they were not to deliver them at once at his warehouse, as they otherwise would have done in ordinary course, but were to advise him of their arrival, and deliver them only on receiving a written or printed order from him to that effect. These instructions have been accepted and regularly acted on by Messrs. Carver & Co.

It was not proved, and indeed it was wholly denied by the defendants, that they ever had notice of these instructions by the plaintiff to Messrs. Carver & Co., or of this his course of dealing with them.

In ordinary course, the three bags of waste consigned from Lille on the 7th of September would be shipped to Hull, forwarded from there, and arrive at Manchester about the 14th or 15th of September.

On the 13th of September, the defendants wrote to the plaintiff the following letter, which he received on the 14th of September:—

*"Hull, 13th September, 1864.

"Sir,—We beg to advise of having forwarded to your [*411 address the under-mentioned goods, per Carver & Co.

"Via Manchester."

Q 59 Q 3 bales waste.

ex Transit from Dunkirk.

"Charges forward.

| | | |
|-------------------------------------------------------------------------|--------------|-------|
| "Freight from Lille to Manchester | 112 kills. } | 0 6 5 |
| "Trinity House primage | 55/10 } | |
| "Disbursement as per bill of lading | | |
| "Duty | | |
| "Carriage | | |
| "Dock charges for landing, wharfage, weighing, and delivering | | |
| "Cooperage, examining, making up, and cartage | | |
| "Postage | | |
| "Commission for entering and forwarding | | |

The goods left Hull on the 14th, and arrived in Manchester the same evening or the next morning.

There was no complaint at the trial, on the part of the plaintiff, that the goods did not arrive in Manchester in proper time.

On the arrival of the goods in Manchester, they were not sent up

to the plaintiff's warehouse, in consequence of his above-mentioned instructions to Messrs. Carver & Co. Messrs. Carver & Co., through some oversight, neglected to advise the plaintiff as usual of their arrival; and the plaintiff never inquired for the goods at Messrs. Carvers', although his servants were there about other matters almost every day. This was to some extent accounted for by the extensive nature of the plaintiff's business; different departments being conducted by different clerks.

The market for waste was falling during the whole period from the 7th of September, and by the 5th of October had fallen 50 per cent.

*412] On the 5th of October, the plaintiff, having in the mean time given no notice whatever to the defendants of the non-arrival of the goods, invoiced them to the defendants at 22*l.* 8*s.* 6*d.*, being what the goods were worth in the Manchester market when they were delivered to the defendants at Lille.

Upon the above facts, the advocate for the plaintiff contended that the defendants were bound to deliver the goods to the plaintiff at his warehouse in Manchester, or, at all events, to give him notice of their arrival in Manchester.

The judge decided that the plaintiff, by his instructions to Carver & Co. not to deliver the goods until they had received a written or printed order from him, had himself been the cause of the defendants' contract to deliver not having been carried out; and that the defendants, not having had notice of the plaintiff's instructions to Messrs. Carver & Co., and never having assented thereto, were not bound to advise the plaintiff of the arrival of the goods in Manchester in any other way than by their delivery; and therefore that the defendants were not liable in the present action.

If, upon the above facts, the court should be of opinion that the plaintiff was not entitled to recover, then the judgment for the defendants was to stand. If, however, the court should be of opinion that the plaintiff was entitled to recover, then the case was to be remitted back for a new trial, or otherwise disposed of as the court should direct.

Holker, for the plaintiff.(a)—The defendants, who were carriers professing to carry from Lille, in Flanders, *to Lancashire, employed Thompson, McKay & Co. as their agents to forward their goods from Hull to Manchester and other places. In October, 1862, the plaintiff, who had been in the habit of employing the defendants for some time to carry goods for them, wrote to them requesting them to send their consignments in future through Messrs. Carver & Co., by the Lancashire and Yorkshire Railway, instead of, as there-

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the defendants were, under their contract with the plaintiff, bound either to deliver the goods on their arrival in Manchester, or else advise the plaintiff of their arrival:

"2. That Messrs. Carver & Co. were the agents of the defendants, and any notice given to them was notice to the defendants:

"3. That Messrs. Carver & Co., as agents for the defendants, were authorized to consent or agree on their behalf to give notice to the plaintiff of the arrival of his goods, instead of immediately sending them to his place of business; and that the consent or agreement they gave or entered into was in fact the consent or agreement of the defendants:

"4. That the defendants are liable to answer to the plaintiff for the negligence of Carver & Co.:

"5. That, upon the facts stated in the case, the plaintiff was entitled to judgment."

tofore, by the Sheffield and Lincolnshire Railway. In pursuance of this request, the defendants sent all goods subsequently received by them for the plaintiff through Carver & Co.; and Carver & Co.'s course of business was, to deliver all goods so received by them for the plaintiff at his place of business at Manchester. Some time since, the plaintiff gave instructions to Carver & Co. not to deliver his goods at once at his warehouse, but to advise him of their arrival, and deliver them only on receiving a written order from him to that effect. To this Carver & Co. assented. On the 13th of September, 1864, the plaintiff received from the defendants an intimation of their having forwarded to his address, through Carver & Co., three bales of cotton-waste, which duly arrived at Carver & Co.'s *warehouse on [*414 the following day. They remained at Carver & Co.'s for a considerable time, no notice of their arrival having been given to the plaintiff. In the mean time, the market for cotton-waste became much depressed: and the question now is, whether the defendants are not responsible for the loss. The county-court judge ruled that they were not. Now, if Carver & Co. were the agents of the defendants, they clearly were responsible for their negligence: *Butcher v. The South Eastern Railway Company*, 16 C. B. 13 (E. C. L. R. vol. 81); *Sadler v. Henlock*, 4 Ellis & B. 570 (E. C. L. R. vol. 82); *Powell on Carriers* 167. In *Golden v. Manning*, 2 W. Bl. 916, it was held that a carrier is bound to *deliver* goods, if it be the general course of his trade so to do. [WILLES, J.—The contrary has been held as to a carrier by sea, on a charter-party.] In *Bourne v. Gatcliffe*, 11 Clark & Fin. 45, it was held that a carrier by sea is not entitled immediately on the arrival of a vessel, and without notice to the owner, to land the goods; and, if he do so, and they are destroyed at the wharf, he will be answerable to the owner for the loss. [WILLES, J.—That arose on a bill of lading.] It did. [WILLES, J.—The arrangement between the plaintiff and Messrs. Carver & Co. turned the latter into warehousemen.] Not so: the arrangement simply was, that, instead of delivering the goods on arrival, Carver & Co. should give the plaintiff notice of their arrival.

Pope, for the respondent, was not called upon.

WILLES, J.—I am of opinion that the decision of the county-court judge in this case was right, and ought to be affirmed. This is in effect an action by the plaintiff against Messrs. Brownlow & Co., carriers at Hull, for not giving the plaintiff notice of the arrival of certain cotton-waste carried by them for him from *Lille to Manchester. It appeared that Brownlow & Co. had formerly [*415 employed Thompson & Co. to forward goods for them from Hull to Manchester, viâ the Manchester, Sheffield, and Lincolnshire Railway; but, at the plaintiff's request, they employed Carver & Co., who used the Lancashire and Yorkshire Railway: and the course of business had been, to deliver all goods consigned to the plaintiff through them at the plaintiff's place of business. Before the goods in question were forwarded, the plaintiff had requested Carver & Co. not to deliver goods for the future at his warehouse,—that is to say, not to fulfil the contract for carriage in the ordinary way,—but to keep the goods until they received the plaintiff's orders for their disposal, sending him notice of their arrival. The result at which the county-court

judge arrived upon this state of facts, was, that Brownlow & Co. were employed as carriers for the purpose of carrying and delivering the goods to Butterworth; that Brownlow & Co. employed Carver & Co. to carry that contract into effect; and that, unknown to Brownlow & Co., Butterworth made a contract with Carver & Co., not for carrying, but for warehousing the goods with them. I think it is impossible to say that the county-court judge was wrong in that conclusion of fact, or in the conclusion of law resulting from it.

BYLES, J.—I am of the same opinion. The plaintiff in effect says to the defendants' agents, "Do not in future pursue the ordinary course of business, by delivering the goods on arrival, but keep them until I send you instructions." The defendants, knowing nothing of this arrangement between the plaintiff and Carver & Co., send their goods on in the expectation that Carver & Co. will do their duty. The latter have, it may be, been guilty of negligence in omitting to
 *416] do *something which they were directed by the plaintiff to do, without the knowledge of the defendants. The defendants clearly are not liable for that.

KEATING, J., had gone to Chambers.

Judgment affirmed, with costs.

RAY v. JONES. June 20.

By a deed of arrangement under s. 192 of the Bankruptcy Act, 1861, purporting to be made between the debtor of the first part, and the several executing creditors, on behalf of themselves and all and every other the creditors who might assent to or become bound by the deed, of the second part, the debtor covenanted to pay all his creditors the amount of their respective debts by nine monthly instalments, and the parties of the second part agreed to accept such instalments, and covenanted, that, "while the said instalments were duly and regularly paid by the debtor, they would not sue him or enforce any judgment or other proceedings against him or his estate:"—Held, that this amounted only to a covenant not to sue for a limited time, and was not pleadable in bar as a release.

THIS was an action for goods bargained and sold, goods sold and delivered, and money found due upon accounts stated. The declaration was as follows:—

William Ray, the trustee on behalf of the creditors of F. R. Gilder, a debtor, under a deed or instrument made and entered into between the said F. R. Gilder and his said creditors, and the plaintiff, as trustee as aforesaid, relating to the debts and liabilities of the said F. R. Gilder, and his release therefrom, according to the clauses of the Bankruptcy Act, 1861, relating to trust deeds for benefit of creditors, and which said deed or instrument has been duly registered under the said act of parliament, and under which said deed or instrument, all things necessary in that behalf having happened and been done, all the property comprised in the said deed or instrument, including the causes of action hereinafter mentioned, was and is under the said act of parliament vested in the plaintiff as such trustee as aforesaid, by, &c.,
 *417] sues the defendant for money payable by the defendant to the plaintiff as *such trustee as aforesaid for goods before the making or entering into or execution of the said deed or instrument bargained and sold by Gilder to the defendant at his request, and for

goods before the making or entering into or execution of the said deed or instrument sold and delivered by Gilder to the defendant at his request, and for money before the making or entering into or execution of the said deed found to be due from the defendant to Gilder on accounts before the making or entering into or execution of the said deed stated between them the defendant and Gilder: and the plaintiff as such trustee as aforesaid claimed 50ℓ.

The defendant pleaded, that, after the accruing of the causes of action in the declaration mentioned, and after action, to wit, on the 10th of April, 1865, the defendant, then being indebted to divers persons, made and executed a deed, which, without the schedule or signatures and attestations thereto, is in the words and figures and to the effect following, that is to say:—"This indenture made the 10th day of April, 1865, between Stephen Thomas Jones, of, &c. (hereinafter called the said debtor), of the first part, and the several persons, companies, and firms, whose names are subscribed and seals affixed in the schedule hereunder written, being creditors of the said debtor, on behalf of themselves and all and every other the creditors of the said debtor who may assent to or become bound by these presents, of the second part: Whereas, the said debtor is indebted to the parties hereto of the second part and other persons in sums which he is unable to pay at the present time, and it has been agreed by and between the parties hereto to give the said debtor the time hereinafter mentioned for payment of his debts in full: Now, this indenture witnesseth, that he the said debtor hereby, for himself, his executors and administrators, covenants and agrees to and with *the said parties hereto [*418 of the second part, that he will duly pay all and every the debts and claims of the parties hereto of the second part, and all other his creditors, whether executing these presents or not, the full amount of their respective debts and claims that are now due and owing by the said debtor, by nine equal monthly instalments, the first payment of an equal ninth part thereof to commence and be made on the 20th of May next, and a similar payment to be made on the 20th of each following month until the whole of his said debts are satisfied and discharged: And this indenture further witnesseth, that, in pursuance of the said agreement, and in consideration of the debtor's covenant as hereinbefore contained, they the parties hereto of the second part hereby covenant and agree to accept payment of their respective debts by the nine instalments hereinbefore mentioned, and, *while the said instalments are duly and regularly paid by the said debtor, not to sue the said debtor or enforce any judgment or other proceedings against him or his estate*: And it is lastly agreed that this indenture shall operate (so far as it lawfully may) as a deed of arrangement between the said debtor and his creditors under the Bankruptcy Act, 1861." Averment, that a majority in number representing three-fourths in value of the creditors of the defendant whose debts respectively amounted to 10ℓ. and upwards, did in writing assent to and approve of the said deed; and the execution of the said deed was attested by an attorney and solicitor; and within twenty-eight days from the day of the execution of the said deed by the defendant the same was produced and left (having been first duly stamped) at the office of the chief registrar of the court of bankruptcy for the pur-

pose of being registered, and together with such deed there was *419] delivered to the said chief registrar such affidavit *by the defendant as by the Bankruptcy Act, 1861, in that behalf is provided; and the said deed did before the registration thereof bear such ordinary and ad valorem stamp-duties as were provided by the Bankruptcy Act, 1861; in that behalf and at the time of the execution of the said deed the plaintiff was a creditor of the defendant in respect of the amount claimed herein pleaded to within the meaning of the Bankruptcy Act, 1861; and that, all conditions prescribed by the said act having been observed and performed, and all things having happened necessary in that behalf, the plaintiff became and was and is bound by the said deed as if he had been a party thereto and had executed the same.

The plaintiff demurred to this plea, the ground of demurrer stated in the margin being, "that the deed set out in the plea is no defence to the action, as it contains no release, and contains unreasonable provisions." Joinder.

Prentice, in support of the demurrer.(a)—The deed set out in the plea does not amount to a release, and could not have been pleaded as such even if the plaintiff had been an executing party. [WILLES, J.—A covenant not to sue may, according to the case of *Keys v. Elkins*, 34 Law J., Q. B. 25, be set up as an equitable defence.] There was a release there: the deed provided that the creditors who executed it thereby agreed to accept *420] "these presents in full discharge and satisfaction of their respective debts, claims, and demands" against the defendant; and they thereby released the defendant from all their debts and claims against him, and agreed that the deed might "operate as a defeasance pleadable in bar to or be otherwise set up as a defence to any action," &c. Here, the covenant is merely an engagement on the part of the creditors, parties thereto, that they will not sue the debtor so long as the instalments are regularly paid. A covenant not to sue for a limited time cannot be pleaded as a release: *Thimbleby v. Barron*, 3 M. & W. 210; *Gibbons v. Vouillon*, 8 C. B. 483 (E. C. L. R. vol. 65). In *Walker v. Nevill*, 34 Law J., Exch. 73, a covenant on the part of the creditors, contained in a deed of composition and inspection, not to sue within a time limited, viz. before the 20th of May, 1865, was held to be pleadable as a release, because it was accompanied by an express stipulation to the following effect,—“that these presents shall and may be pleaded and allowed in any court of law or equity as a bar or in discharge of all and every action or actions, suit or suits, or other proceedings, judgments, and executions which shall or may be brought, commenced, sued, prosecuted, or taken against the debtors, or either of them, or their or either of their goods or estates, by the said several creditors or any of them, contrary to the true intent and meaning of these presents.” In delivering the judgment of the court, Chan-

(a) The points marked for argument on the part of the plaintiff were as follows:—

“1. That the plea is no defence to the action, as it contains no release:

“2. That the deed could not have been pleaded as a defence, if the plaintiff had executed it:

“3. That the deed is not binding on non-assenting creditors, as creditors executing are in a different position from those not executing:

“4. That non-assenting creditors are not bound by the covenant not to sue.”

nell, B., there says: "There is no doubt that a simple covenant not to sue for a limited time, is of itself only the subject for a cross-action if broken, and not pleadable in bar. But here there is an express provision, that, during this limited time, the deed may be pleaded in bar: and we think, that, if the plaintiff had in fact executed such a covenant, it might be pleaded in bar to an action by him. This being the case, he is in the same position *by virtue of the statute, [*421 unless this or some other covenant in the deed is so unreasonable that the assent of the requisite majority cannot bind the minority." There is no such provision in this deed: and the court will not allow an amendment so as to raise an equitable defence, to meet the suggestion thrown out by Crompton, J., in the course of the argument in *Keyes v. Elkins*, and which raises a nice question that was not fully brought to the attention of the court there. It is not so clear that a court of equity would not impose terms. [WILLES, J.—The covenant is, not to sue for the original debt while the nine monthly instalments of the composition are duly and regularly paid. It is not a release, with a condition subsequent.] The plea is clearly a bad one.

Piffard, contra.(a)—The only covenant in this deed by the parties of the second part is this covenant not to sue. The effect of it is, a positive covenant not to sue, with a defeasance in case the instalments are not duly paid. The court will not extend the strictly technical rule laid down in *Thimbleby v. Barron*, 3 M. & W. 210, *Gibbons v. Vouillon*, 8 C. B. 483, *Ford v. Beech*, 11 Q. B. 852 (E. [*422 C. L. R. vol. 63), and other cases. This covenant can only be pleaded as a release. It is like the covenant in *Hidson v. Barclay*, 3 Hurlst. & Colt. 9. In all these cases, a covenant not to sue is considered the more appropriate one, inasmuch as a release might affect the rights of others.

Prentice, in reply.—The deed in *Hidson v. Barclay* had a covenant in terms similar to that in *Walker v. Nevill*, 34 Law J., Exch. 73.

WILLES, J.—Mr. Piffard has said all that could be said in favour of this plea, and has referred to the authorities on which alone it could be sustained, if at all, and especially to the case of *Hidson v. Barclay*, 3 Hurlst. & Colt. 9. I am, however, of opinion that those authorities are not sufficient to bear him through. The plea sets up a deed by which the statutory number of the defendant's creditors have agreed to receive payment of their respective debts by nine equal monthly instalments. The deed was intended to bind all the creditors, and for the present purpose I assume that it does so. It contains a covenant by the creditors to accept the instalments, and, "while the said instalments are duly and regularly paid by the debtor, not to sue the said debtor or enforce any judgment or other proceedings against

(a) The points marked for argument on the part of the defendant were as follows:—

"That the plea is a good defence to the action, notwithstanding it contains no formal release, inasmuch as,—first, it could have been pleaded as a defence, if the plaintiff had executed it,—secondly, the deed is binding on non-assenting creditors, as creditors executing are not in a different position from those not executing,—thirdly, non-assenting creditors are bound by the covenant not to sue, inasmuch as the covenant not to sue is not a covenant by the subscribing parties only, but a covenant by the parties hereto of the second part, that is, 'the several persons, companies, and firms whose names are subscribed and seals affixed in the schedule hereunder written, being creditors of the said debtor, on behalf of themselves and all and every other the creditors of the said debtor who may assent to or become bound by these presents.'"

him or his estate." In terms, that is obviously a covenant not to sue, not a release nor a defeasance; for, if it had been intended to enure as a release, it would have been expressed in language such as is found in the deed in *Gibbons v. Vouillon*, 8 C. B. 483 (E. C. L. R. vol. 65), or in *Hidson v. Barclay*. No authority has been cited to show that a release or defeasance is to be implied, unless there be something in *423] the language of the instrument itself to *warrant such an implication. If it can be construed as a covenant not to sue, it ought to be so construed. A covenant not to sue, if absolute, may be pleaded as a release: and, by a benignant construction, this covenant might, if all the instalments were paid, be said to be an absolute covenant not to sue, and so to operate as a release. But it would be obviously contrary to the intention of the parties, as well as contrary to the doctrine laid down in *Thimbleby v. Barron*, 3 M. & W. 210, to hold it to amount to a release in the first instance. The deed, therefore, amounting only to a qualified covenant not to sue, and there being no release or defeasance, or satisfaction independently of the statute, amounts to no defence, though in all other respects it might be a strict compliance with the statute. For these reasons, I feel bound to give judgment for the plaintiff.

BYLES, J.—I am of the same opinion. No doubt, the general rule is, that a covenant not to sue, when it does not affect other parties, and is so intended, may be pleaded as a release. Since *Thimbleby v. Barron*, 3 M. & W. 210, a mere covenant not to sue operates nothing, not even a suspension of the action. If this deed had contained a provision similar to that in *Walker v. Nevill*, 34 Law J., Exch. 73, the result might have been different.

KEATING, J.—I am of the same opinion. I think it is impossible to extend this covenant beyond a covenant not to sue within a limited time,—a conditional covenant. Judgment for the plaintiff.

*424] *THE VESTRY of the Parish of ST. MARYLEBONE, Appellants; JOHN STEPHEN VIRET, Respondent. *June 23.*

Where the vestry or district-board of a parish or district, under the powers conferred on them by the Metropolis Local Management Act, 18 & 19 Vict. c. 120, substitute a new sewer in a course different from that of an old one, and think proper to divert house-drainage (not in itself defective or insufficient) from the latter to the former, they are bound (under s. 69) to provide new drains for the old ones so diverted, and cannot call upon the owners of the premises, under s. 73, to pay the expense of such new drains.

ON the 26th of February, 1864, John Stephen Viret, the respondent, appeared before one of the magistrates at the Marylebone police-court, in answer to the following summons:—

“ Marylebone Police Court.

| | | |
|----------------------------------------------------------|---|---------------------------------------------------------------------------------------------------------------------|
| Metropolitan police district and county of Middlesex. | { | To John Stephen Viret, of No. 17, Edgeware Road, in the parish of St. Marylebone, in the county of Middlesex: |
|----------------------------------------------------------|---|---------------------------------------------------------------------------------------------------------------------|

“Whereas complaint hath this day been made before me the undersigned, one of the magistrates of the police courts of the metropolis sitting at the police court High Street, Marylebone, in the county of

Middlesex, and within the metropolitan police district, by the vestry of the parish of St. Marylebone, For that, on the 1st of January, 1864, the vestry of the parish of St. Marylebone, in the county of Middlesex, a parish included in Schedule A to the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), under and in execution of the said act, and in consequence of the neglect and refusal of the owner of the premises hereinafter mentioned to comply with their lawful requisition in respect of the works hereinafter mentioned, incurred certain expenses amounting to 17*l.* 7*s.* 4*d.*, in and about constructing and making from the house or building situate and being No. 17, Edgware Road, in the said parish, and within the metropolitan police district, of which house you are the occupier, into a certain sewer in the Edgware Road aforesaid, being a sewer of sufficient size, and within 100 feet of such house, and on a lower level than such house, a certain *covered drain and other fit and proper works requisite to secure the safe and proper working of the same; and [*425 that payment of the said sum of 17*l.* 7*s.* 4*d.* for such expenses hath been required of you, and that the same hath not been paid :

"These are therefore to command you, in Her Majesty's name, to be and appear on Saturday next, at 2 o'clock in the afternoon, at the police court aforesaid, before me, or such other magistrate of the said police court as may then be there, to show cause why an order should not be made under the provisions of the Metropolis Management Acts, 1855 (18 & 19 Vict. c. 120), and 1862 (25 & 26 Vict. c. 102) for the payment by you to the vestry of the said sum of 17*l.* 7*s.* 4*d.*

"Given under my hand and seal," &c.

On the hearing of the summons, the following facts were proved:—

1. Viret was the occupier of the above-mentioned house and premises. Complaint having been made to the vestry as to the drainage of the house and premises No. 17, Edgware Road, the surveyor of the vestry, by their direction, examined the drains of the said house and premises, and made a report to the vestry; and the vestry, on the 30th of July, 1863, after duly considering the matter, came to the following resolution, which was duly entered on their minutes:—

"Resolved, that the premises Nos. 13, 14, 16, and 17, Edgware Road, and Nos. 33 and 34, Upper Seymour Street, not being drained by sufficient drains communicating with a sewer and emptying themselves into the same to the satisfaction of the vestry, notices be given to the owners of the respective premises 13, 14, 16, and 17, Edgware Road, requiring them, pursuant to the 73d section of the Local Management Act, to drain their premises by separate drains into the front *sewer in the Edgware Road; and that like notices be given [*426 to the owners of the respective premises Nos. 33 and 34, Upper Seymour Street, to drain by separate drains into the sewer in Upper Seymour Street; and that the old drain or sewer at the rear of the above premises in the Edgware Road and under the houses 33 and 34 Upper Seymour Street be discontinued."

2. On the 21st of August, 1863, the following notice was duly served upon Viret:—

"Parish of St. Marylebone.

"To the owner of the house and premises No. 17, Edgware Road, in the parish of St. Marylebone, in the county of Middlesex:

the whole block of houses before mentioned: and, in 1859, one Butcher drained *into it, from a tenement in Adams Mews, at the *430] back of the said block of houses, with the permission of the vestry. It had also been cleansed and flushed by the commissioners of sewers in the years 1849 and 1850, upon the representation made by their surveyor.

10. The effect of the said works of the vestry was, to drain the said house and premises No. 17 by a sufficient covered drain, having the branches, the size, the level, the fall, and the other properties and incidents required by the 73d section of the 18 & 19 Vict. c. 120, communicating with and emptying itself into the said Edgware Road sewer, which is of sufficient size within the meaning of the said section, and within twenty-six feet of the front wall of the said house, and is on a lower level than such house and premises.

11. The vestry also removed and filled up all the drains leading from the interior of the said house and premises No. 17 Edgware Road to the old drain, and then cut off all communication therewith from the said premises, by bricking up the same.

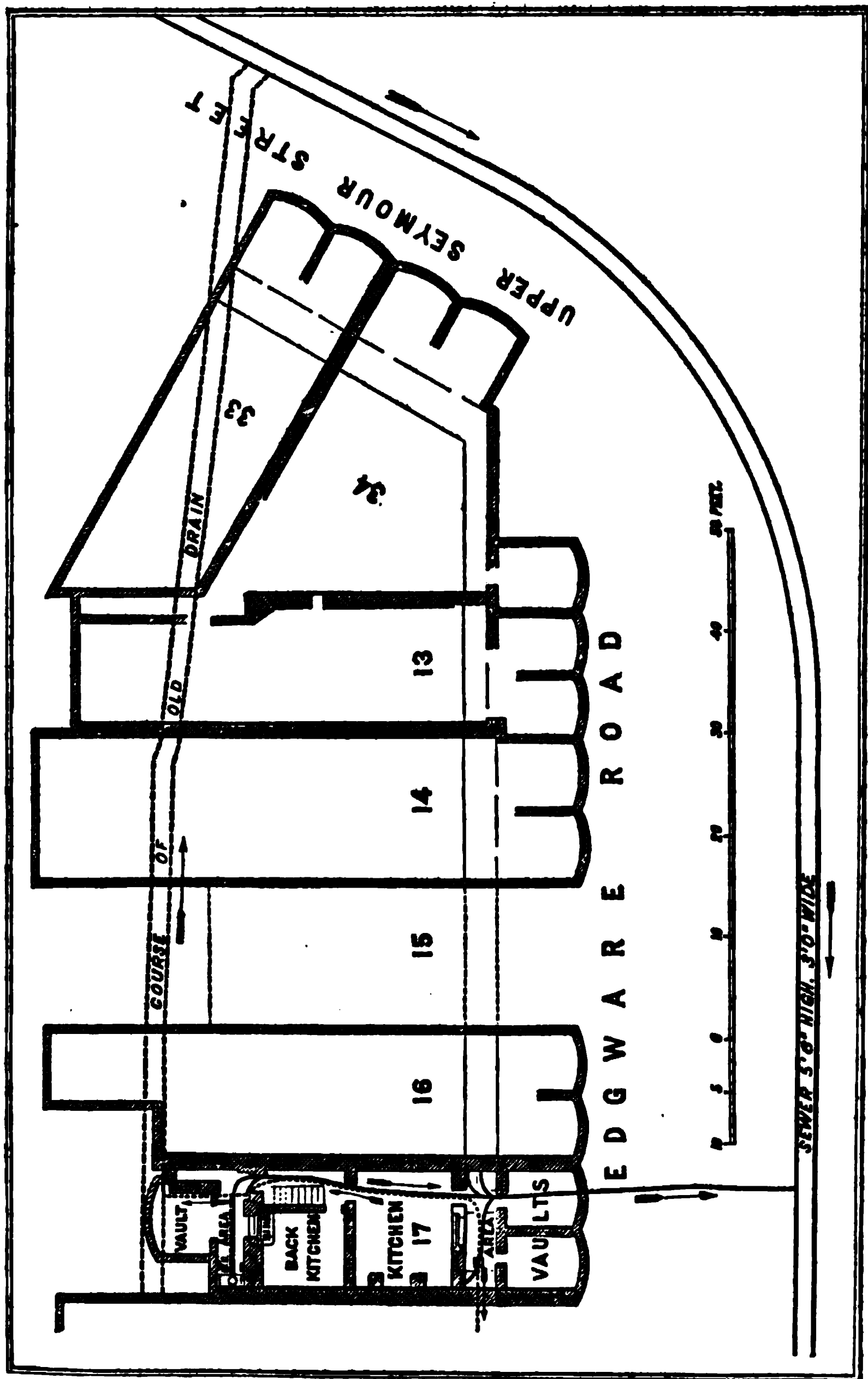
12. The annexed plan correctly describes the relative situation of the Edgware Road sewer, and of the old drain, and of the drains in No. 17 communicating with the same, respectively; the red line describes the new drains communicating with the Edgware Road sewer; the blue lines the drains communicating with the old drain.

13. It was contended before the magistrate, on behalf of the respondent,—first, that the alteration in his drains was an alteration in the system of drainage, and did not come within the 18 & 19 Vict. c. 120, s. 73, but under section 69 of that act; and that such alterations ought to have been executed at the expense of the parish, and not at that of the respondent,—secondly, that, under the 73d section, the *431] vestry was only authorized to require the respondent to make *sufficient drains communicating with the old drain or sewer at the back of the said house and premises, that being, as he contended, a “sewer,” and being nearer to his house and premises than the sewer in the Edgware Road.

14. The appellants contended that the old drain was not a “sewer” within the meaning of the statutes; and that, if it was, the vestry had nevertheless the right to make the alterations.

15. Thirdly, it was contended on behalf of the respondent that the magistrate had jurisdiction to review the decision of the vestry, and to determine whether or not, before the alterations, the respondent's house was drained by a sufficient drain communicating with some sewer.

16. The magistrate was of opinion that he had no power to review the decision of the vestry. He held also that the “old drain” running behind the block of buildings in which the respondent's house is comprised was a “sewer” within the meaning of the interpretation clause of the 18 & 19 Vict. c. 120, s. 250; that the commissioners of sewers had exercised control over it; that the rights of the said commissioners passed to the vestry by the operation of s. 68 of the same act, and that, in one instance, the vestry had used such rights; that the appellants were bound by s. 69 of the same act to supply private drains necessary to enable the respondent's house to drain into the sewer in



Note -The dotted lines (referred to in the case as blue lines) on Plan of No. 17, represent the original mode of Drainage.
The plain lines (referred to in the case as red lines), the new Drainage as laid down by Order of Vestry.

Edgware Road; and that, the appellants having so done, the respondent was not liable to them for the expenses thereby incurred.

17. All formal matters were duly proved; and it was solely on the last-mentioned ground that the magistrate refused to make the order for payment of the 17*l.* 7*s.* 4*d.*

*432] The appellants being dissatisfied with the decision, *as being erroneous in point of law, demanded a case for the opinion of this court. They therefore prayed the judgment of the court upon the above facts.

Keane, Q. C. (with whom was *Poland*), for the appellants.—The question in this case turns mainly upon the construction of the 69th and 73d sections of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. By the former it is provided that the vestry (or board of works) of every parish or district shall from time to time repair and maintain the sewers vested in them, &c.; and that it shall be lawful for any such vestry or district-board from time to time to enlarge, contract, raise, lower, arch over, or otherwise improve or alter all or any of the sewers, watercourses, and works which shall be from time to time vested in them or subject to their order or control, and to discontinue, close up, or destroy such of them as they may deem to have become unnecessary: provided always that no new sewer shall be made without the previous approval of the metropolitan board of works: provided also, that the discontinuance, closing-up, destruction, or alteration of any sewer as aforesaid shall be so done as not to create a nuisance; and that if, by reason thereof any person shall be deprived of the lawful use of any covered sewer, it shall be the duty of the vestry or district-board to provide some other sewer or a drain as effectual for his use as the sewer of which he is so deprived: provided also, that “where the vestry or district-board alter any sewer, or provide a new sewer in substitution for a sewer discontinued, closed up, or destroyed, they may contract or otherwise alter the private drains communicating with the sewer so altered, or with the sewer so discontinued, closed up, or destroyed, or may close up or destroy such private
*433] drains, and provide new drains in lieu thereof, as the circumstances of the sewerage may appear to them to require, but so that in every case the altered or substituted drain shall be as effectual for the use of the person entitled thereto as the drain previously used.” And the 73d section enacts, that, “if any house or building, whether built before or after the commencement of this act, situate within any such parish or district, be found not to be drained by a sufficient drain communicating with some sewer, and emptying itself into the same, to the satisfaction of the vestry or board of such parish or district, and if a sewer of sufficient size be within one hundred feet of any part of such house or building on a lower level than such house or building, it shall be lawful for the vestry or board, at their discretion, by notice in writing, to require the owner of such house or building forthwith, or within such reasonable time as may be appointed by the vestry or board, to construct and make from such house or building into any such sewer a covered drain, and such branches thereto, of such materials, of such size, at such level, and with such fall as shall be adequate for the drainage of such house or building, and its several floors or stories, and also its areas, water-

closets, privies, and offices (if any), and for conveying the soil, drainage, and wash therefrom into the said sewer, and to provide fit and proper paved or impermeable sloped surfaces for conveying surface water thereto, and fit and proper sinks, and fit and proper syphoned or otherwise trapped inlets and outlets for hindering stench therefrom, and fit and proper water supply and water-supplying pipes, cisterns, and apparatus for securing the same, and for causing the same to convey away the soil, and fit and proper sand-traps, expanding inlets, and other apparatus for hindering the entry of improper substances therein, and all other such fit and proper works and arrangements as may appear to the vestry or board, or to their officers, [*434] requisite to secure the safe and proper working of the said drain, and to prevent the same from obstructing or otherwise injuring or impeding the action of the sewer to which it leads: and it shall be lawful for the vestry or board to cause the said works to be inspected while in progress, and from time to time during their execution to order such reasonable alterations therein, additions thereto, and abandonment of part or parts thereof, as may to the vestry or board, or their officers, appear, on the fuller knowledge afforded by the opening of the ground, requisite to secure the complete and perfect working of such works; and, if the owner of such house or building neglect or refuse, during twenty-eight days after the said notice has been delivered to such owner, or left at such house or building, to begin to construct such drain and other works aforesaid, or any of them, or thereafter fail to carry them on and complete them with all reasonable despatch, it shall be lawful for the vestry or board to cause the same to be constructed and made, and to recover the expenses to be incurred thereby from such owner, in the manner hereinafter (s. 227) provided." By the interpretation clause, s. 250, the word "drain" is to mean and include "any drain of and used for the drainage of one building only or premises within the same curtilage, and made merely for the purpose of communicating with a cess-pool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district-board;" and the word "sewer" is to mean and include "sewers and drains of every description except drains to which the word [*435] 'drain,' interpreted as aforesaid, applies." Upon the facts found by the magistrate, it must be assumed that the old drain at the back was a "sewer," within the above definition. The vestry, having found that the old drain was not sufficient, proceeded, under s. 73, as they had a right to do, to call upon the owner of the premises to make a proper drain communicating with the sewer. This was a matter for their determination, and not, as will be insisted on the part of the respondent, for the magistrate. The proper course for the respondent to have pursued, if he felt aggrieved by the decision of the vestry, was, to appeal to the metropolitan board of works, under s. 211,(a) who might have varied or quashed the order of the vestry.

(a) Which enacts that "any person who deems himself aggrieved by any order of any vestry or district-board in relation to the level of any building, or any order or act of any vestry or district-board in relation to the construction, repair, alteration, stopping or filling up, or demoli-

The case finds that the old drain was "decidedly objectionable," and *436] that there was a sewer within 100 feet of *the respondent's premises. The facts therefore existed which entitled the vestry to put in force the provisions contained in s. 73. It will be contended on the part of the respondent, that this was a discontinuance of an old sewer, under s. 69, and therefore a charge properly falling upon the parish, and not upon the individual owner,—an alteration of the system of sewerage, and not an amending of imperfect drainage. No doubt, where the vestry or district-board, for the general benefit of the parish or district, proceed to alter the system of drainage, and in so doing deprive a man of the lawful use of a sewer, they must provide him a new sewer or proper drains to communicate with the old one. But the 73d section proceeds upon the assumption that the owner or occupier has, within 100 feet of a sewer, a drain which is defective and objectionable. When the vestry find that a particular drainage is insufficient, it ceases to be a lawful drain, and the owner or occupier must alter it under s. 73. This is not a case within s. 69 at all. [MONTAGUE SMITH, J.—Does the case find that the old drain was insufficient?] The vestry found that it was objectionable, and the magistrate thought that he could not interfere with their decision. [WILLES, J.—Are we to assume that the abolition of the old drain took place after the resolution of the vestry?] Certainly. [WILLES, J.—The case does not say so.] It having been properly found that there was no sufficient and effectual drainage to the respondent's premises, the vestry had a right to proceed as they did under s. 73.

Macnamara, for the respondent.—That which was done here was an alteration of the system of sewerage, and should (under s. 69) have been done at the expense of the vestry, and not at that of the individual owner. The primary object of the vestry was, to *437] substitute a sewer in front of the respondent's premises for the old sewer at the back: and the alteration of the private drains was rendered necessary in order to divert them into the new sewer,—the red line on the plan being substituted for the blue. The owner of No. 17 Edgware Road was not required to repair or alter an insufficient drain, but to substitute a new course of drainage for the old one,—the vestry conceiving that it would better harmonize with the general system, that the premises should be drained into the new sewer in front. There is no finding that the former drainage of the respondent's premises was faulty or insufficient: the expression "decidedly objectionable" applies only to the system of drainage into which it passed. The case, therefore, falls precisely within the proviso in s. 69, that, "where the vestry or district board alter any sewer, or portion of any building, sewer, drain, water-closet, privy, ashpit, or cesspool, may, within seven days after notice of any such order to the occupier of the premises affected thereby, or after such act, appeal to the metropolitan board of works against the same; and all such appeals shall stand referred to the committee appointed by such board for hearing appeals as herein (s. 212) provided; and such committee shall hear and determine all such appeals, and may order any costs of such appeals to be paid to or by the vestry or district-board by or to the party appealing, and may, where they see fit, award any compensation in respect of any act done by such vestry or district-board in relation to the matters aforesaid: provided that no such compensation shall be awarded in respect of any such act which may have been done under any of the provisions of this act on any default to comply with any such order as aforesaid, unless the appeal be lodged within seven days after notice of such order has been given to the occupier of the premises to which the same relates."

vide a new sewer in substitution for a sewer discontinued, closed up, or destroyed, they may contract or otherwise alter the private drains communicating with the sewer so altered, or with the sewer so discontinued, closed up, or destroyed, or may close up or destroy such private drains, and provide new drains in lieu thereof, as the circumstances of the sewerage may appear to them to require, but so that in every case the altered or substituted drain shall be as effectual for the use of the person entitled thereto as the drain previously used." What more has the vestry done than that? The 68th section vesting all the sewers in them, it is but reasonable that the vestry should at their own expense remedy defects which they find in the system. The magistrate in terms finds that the whole proceeding took place under s. 69: and the vestry cannot by a finding contrary to the fact give themselves jurisdiction so as to exclude the jurisdiction of the magistrate. [BYLES, J.—There is nothing upon the face of the case [*438 to show that the old blue drain did not sufficiently answer its purpose.] Nothing.

Keane, Q. C., in reply.—It is found by the vestry that the old drainage of these premises was insufficient and objectionable; and the magistrate declines to enter into that question. If the decision of the vestry was wrong, the proper course for the respondent to pursue, was to appeal to the metropolitan board, under s. 211. [WILLES, J., referred to *The Vestry of St. George, Hanover Square, app., Sparrow, resp.*, 16 C. B. N. S. 209 (E. C. L. R. vol. 111).] If the vestry had a discretion, they have exercised it, and, it is submitted, properly exercised it under s. 73; the 69th section not being applicable to the state of things existing here, but only to the general purposes of the parish or district.

WILLES, J.—I am of opinion that the decision of the magistrate in this case was right and ought to be affirmed. The question turns upon the construction of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. The principal question is, whether the respondent is bound to pay the expenses incurred by the vestry in constructing certain drains from the respondent's premises into the new sewer coloured red on the plan annexed to the case. It appears that the house in respect of the ownership of which the respondent is alleged by the vestry to be liable, was formerly drained into the old sewer coloured blue, and that the vestry considered the drainage of the house into that sewer unsatisfactory, and made a resolution in the terms of s. 73 of the statute, by which they found that the premises of the respondent, amongst others, were not drained by sufficient drains communicating with a sewer and emptying themselves into the same to their satisfaction; and they resolved that *notice should be given to the owners of the respective pre- [*439 mises, requiring them to drain their premises by separate drains into the front sewer in the Edgeware Road. And it further appears that, under the direction of the vestry, in whom the statute vests very large powers for the alteration and improvement of the drainage of the parish, the drains by which the respondent's house was formerly drained into the old sewer at the back were destroyed, and the outlet into the same filled up, and new drains were made communicating with the new sewer in the front, coloured red on the

plan. It is in respect of the expense of constructing these new drains that the question before us arises: and that question turns upon the construction of s. 73, which provides, that, if any house or building be found not to be drained by a sufficient drain communicating with some sewer, and emptying itself into the same, to the satisfaction of the vestry or board of the parish or district, and if a sewer of sufficient size be within 100 feet of any part of such house or building, on a lower level than such house or building, it shall be lawful for the vestry by notice in writing to require the owner to construct a proper covered drain into such sewer. I will assume that to mean, into any sewer which the vestry may think proper to point out. It appears that the vestry, acting upon the above resolution, did give notice to the respondent, requiring him to make the drain which, on his default, they have constructed for him. The case, therefore, falls literally within the 73d section, as contended for by Mr. Keane. It further appears that the resolution of the vestry finding the old drains insufficient, was accompanied by a resolution "that the old drain or sewer at the rear of the premises should be discontinued: and in truth that which was the object of the vestry, was, not that the drainage of the

*440] respondent's house should be *improved, but that the drainage of that and of the other houses pointed out should be withdrawn from the old sewer and carried into the new one. The question, therefore, arises upon the section which is applicable to that state of things, which is s. 69. Before I proceed to state the provisions of that section and my opinion upon its construction, I think it right to draw attention to the scope and object of the act generally. The intention was, that one body should have the control and direction of the drainage and the sewerage of the parish or district. But a marked distinction is made between that which is for the general benefit of the public, and that which applies only to the convenience of individuals. Drains were considered to be private property, to be provided by the owner of the particular house or building to be benefited by them, and the expense of which, whether in constructing new drains where none existed before, or in providing sufficient drains where insufficient before, should fall upon the owner of the premises. But, with respect to sewers, properly so called, which are not constructed with reference to any private house in particular, it was intended the expense of making and maintaining, or if necessary altering, such sewers should fall upon the public in the shape of a tax. When that is considered, it follows that the 73d section was intended to apply to cases where the drainage of a particular house was either altogether wanting or insufficient. If we look back at s. 72, which provides that "every vestry and district-board shall cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied," &c., we shall at once see the propriety of vesting in the body having the superintendence, not only the power of providing efficient drain-

*441] age, but also the power of altering and *keeping in repair, &c., the great sewers. One of the main sections introduced for that purpose is the 69th. By that section, the vestry or the district-board are required from time to time to repair and maintain the sewers vested in them, or such of them as shall not be discontinued, closed

up, or destroyed under the powers therein contained, and to cause to be made, repaired, and maintained such sewers and works, or such diversions or alterations of sewers and works, as may be necessary for effectually draining their parish or district, &c. Then comes a provision that no new sewer shall be made without the previous approval of the metropolitan board of works, and that the discontinuance, closing up, destruction, or alteration of any sewer shall be so done as not to create a nuisance, and that if by reason thereof any person shall be deprived of the lawful use of any covered sewer, it shall be the duty of the vestry or district board to provide some other sewer or a drain as effectual for his use as the sewer of which he is so deprived. The object of the inquiry I made in the course of the argument with respect to whether the old drain had been closed up, was, to ascertain whether or not this was a case within that proviso; because, if the respondent had been deprived of the use of the old drain, the vestry would be bound to provide him with another. It should seem, however, that that is not so. By the resolution the vestry determine that the old drain or sewer shall be discontinued; but that means that it shall be discontinued so far as the houses referred to had the use of it for the purpose of carrying off their drainage. Then we come to the further proviso, on which the question does arise,—“that, where the vestry or district-board alter any sewer, or provide a new sewer in substitution for a sewer discontinued, closed up, or destroyed, they may contract or otherwise alter the private drains communicating with the sewer *so altered, or with the sewer so discontinued, closed up, or destroyed, or may close up or destroy such private drains, and *provide new drains in lieu thereof*, as the circumstances of the sewerage may appear to them to require, but so that in every case the altered or substituted drain shall be as effectual for the use of the person entitled thereto as the drain previously used.” In the case of an alteration or substitution of a sewer, therefore, such alteration or substitution imposes upon the vestry or district-board the obligation to provide any private individual with an altered or substituted drain as effectual for the drainage of his premises as he had previously used. I come now to the question to which the magistrate applied his mind. Was the system of drainage marked red on the plan an improvement of the drainage rendered necessary by the insufficiency of the existing drainage of the respondent's premises? or was it a drain which by reason of the alteration or substitution of the new for the old sewer the vestry were bound to provide under s. 69? That is partly a question of fact and partly a question of law. I will consider that point first with reference to that as to which there was no evidence, and then I will consider it with reference to that as to which there was positive evidence. First, there was no evidence that the drain by which the respondent's house was drained into the old sewer was an insufficient drain. The finding is that it was old and unsatisfactory. I will assume that to be a *bonâ fide* finding. I will assume that the new sewer was a great improvement. But the reason of that was, because it was a better sewer, and that the old one was a bad sewer to drain into, not because the respondent's drains were insufficient. Before the vestry could have a right to call upon a private individual to pay for the improvement, they

*443] must show that his drains were insufficient and *bad. So much as to what is not found. Then, as to what is found. The magistrate has found that the vestry did do away with the old sewer, and close up the old drain: and the question is whether that was an alteration of the sewer within the 69th section of the act. Physically it was: and it was the alteration of the sewer which rendered it necessary to do that which the vestry were bound to do, viz., to provide the respondent's premises with new drainage as effectual as that which he had previously enjoyed. Bearing in mind the objects of the statute, and the distribution of the burthen of the cost of the contemplated works, I entertain no doubt, upon the merits of the case, that the expense in question should be borne by the public, and not by the respondent individually. I do not think it necessary to go into the question whether or not, if the case were clear of the 69th section, it was competent to the magistrate to entertain it. He thought he had no power to review the decision of the vestry: and I am far from saying that he was wrong. For the reasons I have imperfectly given, I am of opinion that the decision of the magistrate should be affirmed.

BYLES, J.—I am of the same opinion. I think the magistrate was right, and the vestry wrong. The vestry, it seems, had thought fit to make a new sewer in front of the respondent's house, which was under their jurisdiction, and that they closed the old sewer at the back, into which his premises were formerly drained, and it became necessary in consequence to construct a long drain from the respondent's premises to the new sewer: and the question is whether the expense of that work is to fall upon the individual or upon the public.

*444] That depends upon whether the *proceeding should be under the 69th or the 73d section of the Metropolis Management Act, 1855. I think the case falls clearly within the 69th section. The work was done for the improvement of the general system of sewerage, and the expense must be borne by the public. To bring the case within the 73d section, it must be shown that the premises sought to be charged were not drained by a sufficient drain. The case finds that the sewer at the back of the respondent's premises was between sixty and seventy years old, and decidedly objectionable. It depreciates the sewer, but says not a word about the drainage. No single fact is stated or found to give the vestry jurisdiction under s. 73. The facts stated show that they could not have had jurisdiction to proceed under that section. I entirely agree with my Brother Willes that this was a public improvement, which ought to be paid for by the public.

MONTAGUE SMITH, J.—I am entirely of the same opinion. The expenses in question were incurred by the vestry under s. 69. It appears that the old sewer at the back of the respondent's premises was found to be objectionable, and the vestry had substituted for it a new one running along the Edgware Road, in the front: and by a resolution they called upon the respondent to divert his drainage from the old to the new sewer. It is said that the resolution of the vestry is conclusive. I think not. It is not found as a fact that the drainage of the respondent's premises was insufficient or imperfect, so as

to bring the case under the 73d section. On the contrary, it appears that the alteration of the respondent's drains had become necessary in consequence of the substitution of the new for the old sewer. That brings the case within the plain words of the 69th section. The resolution of the *vestry never can be held to be conclusive when the question is whether the facts bring a case within the 69th [*445 or the 73d section. The construction contended for by Mr. Keane cannot prevail. The decision of the magistrate was right, and must be affirmed.

Decision affirmed, with costs.

**THE METROPOLITAN BOARD OF WORKS, Appellants;
ROBERT COX, Respondent. June 23.**

The 98th section of the Metropolis Management Amendment Act, 1862, provides that "no existing road, passage, or way being of a less width than 40 feet shall be hereafter formed or laid out for building as a street for the purposes of carriage-traffic, unless such road, passage, or way be widened to the full width of 40 feet,"—the measurement to be taken half on either side from the centre or crown of the roadway to the external wall or front of the house, or to the fence or boundary of the forecourt, if any :—Held, that this provision did not apply where the buildings abutted in the rear upon an old lane of less width than 40 feet.

THIS was an appeal against an order made on the 9th of February, 1865, by one of the magistrates of the police-courts of the metropolis, sitting at the police-court, Westminster, in the county of Middlesex, dismissing a complaint of the appellants against the respondent founded on a by-law of the appellants as to the formation of new streets in the metropolis, duly made and published under the provisions of the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120, and also on the 98th section of the Metropolis Management Amendment Act, 1862, 25 & 26 Vict. c. 102.

The appellants being dissatisfied with the said determination as being erroneous in point of law, the following case was stated for the opinion of the court under the 20 & 21 Vict. c. 43 :—

1. The complaint came before the magistrate on the 2d of February, 1865, on a summons in the following terms :—

Metropolitan }
Police-District, to wit. } Westminster Police Court.

*"To Mr. Robert Cox, of Oakley Street, Chelsea.

"Whereas, information and complaint have been this day [*446 made before the undersigned, one of the magistrates of the police-courts of the metropolis, sitting at the police-court, Westminster, in the county of Middlesex, and within the metropolitan police-district, by the metropolitan board of works, by John Pollard, clerk of the said board: For that, after the passing of the Metropolis Local Management Act, 1855, and before the committing by Robert Cox, of Oakley Street, Chelsea, builder, of the offence hereinafter mentioned, the said metropolitan board of works did make a by-law as to the formation of new streets in the metropolis as defined by the said act, which said by-law was made, confirmed, approved, and published as required by the said act:

"That, by the 98th section of the Metropolis Management Amend-

ment Act, 1862, it is provided, amongst other things, that no existing road, passage, or way, being of a less width than 40 feet shall be hereafter formed or laid out for building as a street for the purposes of carriage-traffic or of foot-traffic only, respectively, unless such road, passage, or way be widened to the full width of 40 feet or of 20 feet respectively, the measurement of such width being taken half on either side from the centre or crown of the roadway to the external wall or front of the houses or buildings erected or intended to be erected on each side thereof: but, where forecourts or other spaces are intended to be left in front of the houses or buildings, then the width shall be measured up to the fence or boundary dividing or intended to divide such forecourts or spaces from the public way: And such streets respectively shall be open at both ends from the ground upwards; and any road, passage, or way hereafter to be formed or laid out for either of the purposes aforesaid, *shall be deemed to be

*447] a new street, and become subject to all the provisions of the statutes for metropolis management, and to the provisions and penalties of and under any by-laws made or to be made in pursuance thereof in relation to sewerage, drainage, or paving, and to width, construction, surface, inclination, and other requirements and particulars:

"That the said by-law relative to the formation of streets in the metropolis, amongst other things, provided, that, in case of any breach of the regulations contained therein, the offender shall be liable for each offence to a penalty of 40s., and, in case of a continuing offence, to a further penalty of 20s. for each day after notice thereof from the metropolitan board of works:

"That, after the making, approving, and publishing of the said by-law, and the enactment of the said statute of 1862, that is to say, on or about the 2d of December, 1864, the said metropolitan board of works gave notice under the said by-law to the said Robert Cox, of Oakley Street, Chelsea, builder, and whomsoever else it might concern, that he had erected or caused to be erected certain buildings at the southern end and on the eastern side of Hob Lane, Chelsea, in the county of Middlesex, within the limits of the said metropolis as defined by the said Metropolis Local Management Act, 1855, and within the said metropolitan police-district, whereby the said road or lane has been formed and laid out for building as a street for the purposes of carriage-traffic as aforesaid by the said Robert Cox, and was and is of less width than 40 feet as defined and described by the said by-law and statute, that is to say, of the width of 21 feet only, contrary to the said by-law and to the said statute in that behalf:

"These are therefore to command you Robert Cox, in Her Majesty's name, to be and appear on Thursday, *the 5th of January, 1865, at 2 o'clock in the afternoon, at the police-court aforesaid, before me or any other magistrate of the said police-court who may then be there, to answer to the said information and complaint of the said metropolitan board of works, and to be further dealt with according to law. Given," &c.

3. The by-law referred to in the said summons was made and published on or about the 1st of May, 1857, and was, so far as is material to the present case, as follows,—“In case of any breach of the regu-

lations contained in this by-law, the offender shall be liable for each offence to a penalty of 40s., and, in case of a continuing offence, to a further penalty of 20s. for each day after notice thereof from the metropolitan board of works."

4. The facts of the case, as admitted on both sides, were as follows:—The respondent, Robert Cox, is a builder, holding on a lease for 500 years or thereabouts a large piece of ground in Chelsea, which partially abuts on a certain ancient carriage-way varying in width from 21 feet to 18 feet 2 inches or thereabouts, called Hob Lane; and the said piece of ground was at the date of the said lease, and still is, separated from Hob Lane by a wooden fence.

5. The other side of Hob Lane, opposite to the said piece of ground of the respondents, is bounded by the wooden fence of Cremorne Gardens. The respondent has no estate or property in the soil of Hob Lane; neither has he any interest in the property on the other side of it.

6. In laying out his land for building purposes, the respondent obtained under the provisions of the Metropolis Local Management Act, 1855, and the said by-law, the consent of the appellants to and did form and lay out some new streets.

7. The respondent has erected six houses, part of an *intended row of houses fronting upon Seaton Street. The backs of this [*449 row of houses are towards Hob Lane, which is there from 21 to 20 feet wide, and are at a distance varying from 17 feet 5 inches to 10 feet 9 inches from the fence separating the said piece of land of the respondent from Hob Lane as aforesaid, and at a distance varying from 38 feet 2 inches to 31 feet 9 inches from the fence of Cremorne Gardens upon the opposite side of the lane; and there is at present no communication between the backs of the said houses and Hob Lane.

8. The respondent has not widened Hob Lane in any way.

9. The appellants contended, that, by reason of the premises, the respondent had formed or laid out for building as a street for the purposes of carriage-traffic the existing road of Hob Lane; and that, under the by-law and the section of the act hereinbefore mentioned, the respondent was bound to leave and had not left the full width of 40 feet between those houses and the boundary wall of the other side of Hob Lane.

10. The respondent contended, that, by reason of the premises, he had not formed or laid out for building as a street for the purpose of carriage-traffic the existing road of Hob Lane, within the meaning of the said act and by-law; and that he was not bound to widen the same to the said full width of 40 feet.

11. The magistrate adjourned the case until the 9th of February, 1865, and then determined and adjudged that the said complaint and summons ought to be dismissed. The ground of his said determination was, that the existing road called Hob Lane had not been formed or laid out for building as a street for the purposes of carriage-traffic by the defendant.

The question for the opinion of the court was, whether the magistrate was right in dismissing the said complaint.

*450] **Mellish*, Q. C. (with whom was *Raymond*), for the appellants.(a)—The question turns upon the construction of the 98th section of the Metropolis Management Amendment Act, 1862, 25 & 26 Vict. c. 102, which enacts that “no existing road, passage, or way being of a less width than 40 feet shall be hereafter formed or laid out for building as a street for the purposes of carriage-traffic, unless such road, passage, or way be widened to the full width of 40 feet, the measurement of the width of such street to be taken half on either side from the centre or crown of the roadway to the *external wall or front of the houses* or buildings erected or intended to be erected on each side thereof; but, where *forecourts* or other spaces are intended to be left in *front* of the houses or buildings, then the width shall be measured up to the fence or boundary dividing or intended to divide such forecourts or spaces from the public way; or, for the purposes
*451] of foot-traffic only, *unless such road, passage, or way be widened to the full width of 20 feet, measured as aforesaid; or unless such streets respectively shall be open at both ends, from the ground upwards: and any road, passage, or way hereafter to be formed or laid out for either of the purposes aforesaid shall be deemed to be a new street, and become subject to all the provisions of the recited acts(b) and this act, and to the provisions and penalties of and under any by-laws made or to be made in pursuance thereof in relation to sewerage, drainage, or paving, and to width, construction, surface, inclination, and other requirements and particulars.” The question is, what constitutes the forming or laying out for building an existing road or way as a street? It is submitted, that, if there be an existing highway or road, not being a street in the sense of having houses on either side, and any person is desirous of building on either side, there must be a clear width of 40 feet left between the fences or boundaries. Here, the respondent, having a piece of land abutting on Hob Lane, has laid it out in streets, and has built his outer fence at the rear so as to leave less than the space required by the act for a carriage-way. In the interpretation-clause, s. 250, of the 18 & 19 Vict. c. 120, “street” is defined in a way which cannot be applicable to this act, viz., “any highway (except the carriage-way of any turnpike-road), and any road, bridge (not being a county-bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not:” and but little aid is derived from the 112th section of the 25 & 26 Vict. c. 102, which declares that “street” shall be deemed to

(a) The points marked for argument on the part of the appellants were as follows:—

“1. That Hob Lane was at the time of the respondent building the houses abutting on it an existing road, passage, or way of less width than 40 feet, within the meaning of the 98th section of the 25 & 26 Vict. c. 102, and of the said by-law:

“2. That the respondent, by building the said houses as mentioned in the case, formed and laid out Hob Lane for building as a street for the purpose of carriage-traffic, within the meaning of the said 98th section and of the said by-law:

“3. That the respondent did not widen Hob Lane to the full width of 40 feet, as required by the said section and by-law:

“4. That Hob Lane, when so formed and laid out by the respondent, was a new street, within the said section and by-law:

“5. That the respondent ought therefore to have been convicted of an infringement of the said act and by-law, and that the decision of the magistrate in dismissing the complaint of the appellants was erroneous in point of law.”

(b) 18 & 19 Vict. c. 120; 19 & 20 Vict. c. 112; and 21 & 22 Vict. c. 104.

apply to and include the subject-matters specified in the 250th section of the firstly recited act; and that the expression "new street" shall apply to and include "all streets hereafter to be formed or laid out, and a part of any such street, and also all streets the maintenance of the paving and roadway whereof had not previously to the passing of this act been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out." [WILLES, J.—The 98th section seems to assume that the houses are to *face* the street.] The mischief intended to be remedied is the same, whether the front or the rear of the houses abuts upon the road.

Keane, Q. C., for the respondent, was not called upon.(a)

WILLES, J.—I am of opinion that the decision of the magistrate was right, and should be affirmed. The meaning of the 98th section of the 25 & 26 Vict. c. 102, evidently is, that the street on which the houses *front* is to be of the prescribed width. I must own I should have thought it a question of fact. [*453]

BYLES, J.—I am of the same opinion. The respondent has not laid out Hob Lane as a street for carriage-traffic. He has done nothing to Hob Lane. Decision affirmed.

Keane, for the respondent, asked for the costs below.

PER CURIAM.—We have nothing to do with the costs below.

(a) The points intended to be urged on behalf of the respondent were as follows:—

"1. That Hob Lane has not been formed or laid out for building as a street for the purposes of carriage-traffic or of foot-traffic:

"2. That the houses of the respondent are at the proper distance from the centre or crown of Hob Lane:

"3. That the respondent is not bound to widen Hob Lane at all:

"4. That the respondent is not bound to widen Hob Lane to the full width of 40 feet:

"5. That the respondent has no right or power and is not bound to widen Hob Lane to the full width of 40 feet, the measurement being taken half on either side from the centre or crown of the roadway:

"6. That the respondent has done all things which he is bound by the said act of parliament to do, and that the respondent is not in respect of buildings erected by him liable to widen Hob Lane."

TAMVACO v. SIMPSON. June 24.

Coals were shipped at Sunderland under a charter-party between one De M. and the defendant (the owner of the vessel), whereby and by the bill of lading they were made deliverable at Alexandria to order or assigns. The charter-party contained the following stipulation,—“The freight to be paid on unloading and right delivery of the cargo less advances in cash at current rate of exchange: One-half of the freight to be advanced by freighter's acceptance at three months, on signing bills of lading: Owner to insure the amount, and deposit with charterer the club-policy, and to guarantee same.

On receiving the acceptance (which became due on the 3d of February, 1864), the agent for the ship endorsed on the bill of lading a receipt for “301*l.* 17*s.* 6*d.*, as per charter-party.”

De M. endorsed the bill of lading in blank, and forwarded it to the plaintiff (for whom the coals had been purchased) at Alexandria. The plaintiff, on the ship's arrival at Alexandria on the 5th of January, 1864, demanded the delivery of the cargo; but the master (having heard that De M. had stopped payment, refused to deliver it unless he received the full freight or a guarantee for its payment. The plaintiff thereupon caused his agents B. & Co. to give the required guarantee, and the coals were delivered. At this time the bill of exchange was out-

standing in the hands of a third person : but the defendant had taken it up before this action was brought.

B. & Co. declining to pay more than the half freight, the master sued them on their guarantee in the Consular Court, and B. & Co. paid the whole freight under protest. In an action by the plaintiff for the wrongful conversion of the coals,—

Held, that the defendant had no lien upon the cargo for the amount represented by the bill of exchange ; and that the plaintiff was entitled to recover it as damages in this action ; and that his right was not affected by the proceedings which took place in the Consular Court.

THIS was an action brought by the plaintiff to recover 301*l*. 17*s*. 6*d*. under the circumstances hereinafter mentioned. By consent, and *454] under a judge's *order, the following case was stated for the opinion of the court:—

1. The plaintiff is a merchant residing at Alexandria, in Egypt ; and the defendant is a shipowner residing at Sunderland, and the owner of a ship called the Parthian.

2. On the 1st of September, 1863, Messrs. Zizinia & Co., of London, as agents for the plaintiff, entered into a contract with one De Mattos, also of London, for the purchase of 2000 tons of steam coal, of which contract the following is a copy :—

“Memorandum of agreement between Mr. W. N. De Mattos and Messrs. Zizinia & Co. :

“Mr. W. N. De Mattos agrees to supply Messrs. Zizinia & Co. with (2000) two thousand tons of best Davidson's West Hartley large steam coals, screened and with usual certificates, say ten per cent., more or less ; the bills of lading for the entire quantity to be delivered to the purchasers by the end of the present month (September) in two or more shipments. Messrs. Zizinia & Co. agree to pay on receipt of the documents (bill of lading and policy of insurance) at the rate of 34*s*. sterling per ton of 20 cwt. nett cash, deducting the balance of freight payable to the captains at Alexandria, together with a commission of 3 per cent. upon the full 34*s*. per ton ; said balance of freight to be paid in cash at Alexandria, at the current rate of exchange for three months' bills on London. The coals to be taken from alongside the ship at the buyer's risk and expense, at the rate of not less than thirty tons per weather working day, Sundays excepted. In the event of Mr. De Mattos neglecting to supply tonnage in the specified time, Messrs. Zizinia & Co. are at liberty to charter ships for the said quantity, at current rates, for seller's account.”

*455] 3. In pursuance of the aforesaid contract, De Mattos *chartered certain vessels for the conveyance of the said coals ; and, amongst others, he entered into the following charter-party of the Parthian with the defendant :—

“London, 1st October, 1863.

“It is this day mutually agreed between Mrs. Simpson, owner of the good ship or vessel called the Parthian, A. 1., and metalled, —, master, of the burthen of 284 tons register, or thereabouts, now in Havre, or on passage thereto from Queenstown, and W. N. De Mattos, of London, merchant, that the said ship, being tight, staunch, and every way fitted for the voyage, shall with all possible despatch, after discharging present cargo at Havre, sail and proceed to South Dock, Sunderland, and there load in the customary manner from the factors of the said freighter a full and complete cargo of steam coals, to be loaded in regular turn, not exceeding what she can reasonably stow

and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, shall therewith proceed to Alexandria, or so near thereunto as she may safely get, and there deliver the same, on being paid freight at and after the rate of 30*l*. (five guineas gratuity) sterling, per keel of 21 tons 4 cwt. taken on board and delivered, in full of all port-charges and pilotages, harbour-dues on cargo, Dover and Ramsgate dues, and of all pier and light-dues (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever during the said voyage, always excepted): the cargo to be delivered afloat alongside a railway or other safe wharf, steamer, or floating-depôt, and to be discharged by the ship over the ship's side, as customary; and no part of the cargo to be used during the voyage, or to be retained for ballast. Coals for ship's use to be provided at the *expense of the owners, and the quantity to be stated on bills [*456 of lading. The freight to be paid on unloading and right delivery of the cargo, less advances, in cash, at current rate of exchange. One-half of the freight to be advanced by freighter's acceptance at three months on signing bills of lading. Owner to insure the amount, and deposit with charterer the club-policy, and to guarantee same. One working day per keel and a half, weather permitting, to be allowed the said merchant (if the ship is not sooner despatched) for unloading the said ship at the port of discharge (Sundays and holidays excepted), and ten days on demurrage, over and above the said laying days, at 6*l*. per day. The ship to be addressed to freighter's agents at port of discharge, paying usual commission of 2 per cent. The brokerage of 5 per cent. upon this charter-party is due to Smith, Sundius & Co., ship lost or not lost. The ship and her freight are bound to this venture. All claim for average to be settled in London, in conformity with the rules of Lloyd's. Penalty for non-performance of this agreement, 700*l*."

4. In accordance with this charter-party, De Mattos shipped on board the Parthian 426 tons 13 cwt. of steam coals, being part of the 2000 tons he had contracted to sell Messrs. Zizinia & Co. for the plaintiff, as before stated. The captain of the Parthian thereupon duly signed a bill of lading for the said 426 tons 13 cwt. of coals, of which the following is a copy:—

"Shipped in good order and well conditioned, by W. N. De Mattos, in and upon the good ship called the Parthian, whereof is master for this present voyage W. Simpson, and now riding at anchor in the port of Sunderland, and bound for Alexandria, 161 Newcastle chaldrons, or 20½ keels, and weighing 426 tons, 13 cwt., of Davidson's West Hartley large steam coals, *which are to be delivered in the [*459 like good order and condition alongside any craft, steamer, floating-depôt, wharf, or pier where the ship can lie afloat, at the aforesaid port of Alexandria, as the agent of the charterer may direct (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted) unto order or to his assigns. The ship to be discharged at the rate of not less than 31½ tons per working day (weather permitting), and, when required by the freighter's agent, such extra quantity as may be practicable; and, if not dis-

charged in the time above specified, demurrage to be paid at the rate of 6*l.* per diem. Freight for the said goods to be paid as per charter-party, with average accustomed. In witness whereof the master or purser of the said ship hath affirmed to four bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void. Dated in Newcastle, 27th October, 1863."

5. The freight on the coals so shipped on board the Parthian amounted, at the rate of 30*l.* per keel reserved by the charter-party, to 603*l.* 15*s.*, one-half of which sum was 301*l.* 17*s.* 6*d.*

6. Upon the said bill of lading being so signed as aforesaid, De Mattos, the charterer, gave his acceptance at three months for 301*l.* 17*s.* 6*d.* in favour of the defendant, pursuant to the terms of the charter-party.

7. The said acceptance was dated the 31st of October, 1863, and became due on the 3d of February, 1864. Upon its being so given as aforesaid, the defendant's agents, Messrs. Smith, Sundius & Co, endorsed a receipt on the bill of lading, of which receipt the following is a copy:—

*460] "Received on account of the within freight three *hundred and one pounds seventeen shillings and sixpence, as per charter-party.

£301 17 6.

"for Mrs. Mary Simpson,

"SMITH, SUNDIUS & Co., as agents."

8. De Mattos then made out and delivered to the plaintiff's agent an invoice showing what was due for the coals shipped by the Parthian, of which the following is a copy:—

"London, 28th October, 1863.

"Messrs. Zizinia & Co. to W. N. De Mattos.

Under contract of 1st September, 1863.

| | | | | | | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|--|-----------------|-----|------|
| "426½ tons of Davidson's West Hartley large steam coals, shipped at Sunderland per Parthian, Simpson, master, for delivery at Alexandria, at 34 <i>s.</i> per ton | | | | 725 | 6 | 1 |
| "Freight, at 30 <i>l.</i> per keel | | | | 603 | 15 | 0 |
| "Gratuity | | | | 5 | 5 | 0 |
| | | | | <hr/> | | |
| | | | | 609 | 0 | 0 |
| "Less advance on sailing | | | | 301 | 17 | 6 |
| | | | | <hr/> | | |
| | | | | | 307 | 2 0 |
| | | | | <hr/> | | |
| | | | | | 418 | 3 7 |
| "Less 3 per cent. on 725 <i>l.</i> 6 <i>s.</i> 1 <i>d.</i> | | | | | 21 | 15 2 |
| | | | | <hr/> | | |
| | | | | <u>£396 8 5</u> | | |

"Received by check

"per W. N. DE MATTOS,

"C. A. SPANG."

9. On the 28th of October, 1863, De Mattos endorsed the bill of lading in blank, and handed the same so endorsed to Messrs. Zizinia & Co., the plaintiff's agents, who, on the 31st of October, 1863, paid De Mattos the balance of 396*l.* 8*s.* 5*d.* appearing due on the aforesaid invoice.

10. Messrs. Zizinia & Co. afterwards forwarded the bill of lading so endorsed by De Mattos to the plaintiff, at Alexandria.

11. The defendant was not informed, nor had she any knowledge

at any time before the commencement *of this action, of the said contract between the plaintiff's agent and De Mattos of [*461 the 1st of September, 1863, or of the said invoice, or of the payment of the balance appearing due thereon, or of any dealings or transactions between the plaintiff or his agents and De Mattos, relating to the premises.

12. The ship sailed with her cargo from Sunderland for Alexandria on the 4th of November, 1863; and, shortly after she so sailed, De Mattos became and declared himself insolvent, and ultimately, on the 4th of January, 1864, a deed of insolvency was executed by him and divers of his creditors (not including either the plaintiff or the defendant) under and in accordance with the 192d section of the Bankruptcy Act, 1861, but without the written assent or approval of the plaintiff or the defendant. This deed was registered in accordance with the provisions of the said 192d section on the 1st of February, 1864; and, for the purposes of this case, it is to be assumed that all the conditions required by that section to make the said deed valid, effectual, and binding on all the creditors of the said charterer as if they were parties to and had executed the same, were duly performed at the time of the said registration. The provisions of the said deed are set out in *Strick v. De Mattos*, 3 Hurlst. & Colt. 22, and are to be taken as part of this case.

13. The Parthian afterwards sailed for Alexandria, and arrived there with the cargo on the 5th of January, 1864; on which day the captain reported her arrival to the plaintiff, and stated that he would on the following day (the 6th) be ready to discharge the cargo.

14. The plaintiff, then being the holder of the bill of lading as such endorsee as aforesaid, thereupon took the necessary measures for receiving the cargo, and intimated to the captain that he was prepared to pay *the balance of the freight remaining unpaid after [*462 deducting the 30*li*. 17*s*. 6*d*. referred to in the receipt on the bill of lading. On the following day, namely, the 6th of January, 1864, the captain of the Parthian, who by letters received by him on his arrival at Alexandria, had learnt that De Mattos had suspended payment, refused to deliver the cargo to the plaintiff, except upon the terms of being paid the full amount of the freight, without making any such deduction, or having a guarantee for the payment of the same.

15. The master of the ship thereupon claimed to have a lien upon the said cargo for the payment of the full chartered freight; and, in exercise of such alleged lien, detained the said cargo on board the ship until the 20th of January, the plaintiff during all that time refusing to make such payment or to guarantee or procure a guarantee for the payment to the said master of the full chartered freight.

16. De Mattos's acceptance was not due till the 3d of February, 1864, and was therefore not due at the time when the captain refused to deliver the cargo to the plaintiff.

17. The said acceptance at this time was in the hands of third parties, and was not paid at maturity, but was taken up by the defendant before the commencement of this action.

18. Upon the 20th of January, 1864, Messrs. Barker & Co., of Alexandria, at the request of the plaintiff, and to procure delivery of

the cargo to the plaintiff, gave the master of the Parthian the following guarantee,—the master still continuing his refusal to deliver the cargo without being paid the full amount of the freight or having a guarantee for the payment of the same as aforesaid:—

“Alexandria, 20th January, 1864.

“Captain Simpson, of the Parthian.

*463] “Sir,—In consideration of your agreeing at our *request to deliver to Mr. E. Tamvaco the cargo of coals at present on board your ship, we hereby undertake and guarantee, that, when and so soon as you shall have delivered the said cargo unto the said Mr. E. Tamvaco or his order, that we will on demand pay or cause to be paid to you in cash the full amount of freight due and payable to you in respect of said cargo, without any deduction whatsoever, except commission due. (Signed) “BARKER & Co.”

19. The master of the Parthian, upon receiving the said guarantee, forthwith commenced to deliver the cargo to the plaintiff, and completed such delivery on the 13th of February, 1864.

20. Upon the completion of the said delivery, the master of the Parthian (Mr. De Mattos's acceptance having been in the meantime dishonoured at maturity,) applied to the plaintiff for payment of the full chartered freight; and, upon the plaintiff's refusal to pay the same, applied to Messrs. Barker & Co. for payment of the same in pursuance of the said guarantee. The said Messrs. Barker & Co., however, by the plaintiff's instructions, and on his behalf, also refused to pay the same; whereupon the master of the said ship instituted legal proceedings against the Messrs. Barker & Co. in Her Majesty's Consular Court for Egypt, at Alexandria, which had jurisdiction in the said matter, for the recovery of the sum due from Messrs. Barker & Co. to him on their said guarantee; and the said cause was proceeded with and duly prosecuted, and a day fixed for the trial of the same; but, on the day before such last-mentioned day, Messrs. Barker & Co., on behalf of the plaintiff, and by his authority, and in discharge of their liability under the said guarantee, viz. on the 7th of March, 1864, paid the master of the Parthian the amount agreed to be paid by them *464] under *their said guarantee, without making any deduction for the 301*l.* 17*s.* 6*d.*; the plaintiff at the same time protesting against such payment being demanded or made.

21. Upon receiving the amount so paid by Messrs. Barker & Co. as aforesaid, the master of the Parthian gave them a receipt for the same.

22. The plaintiff afterwards, and before the commencement of this action, repaid Messrs. Barker & Co. the amount so paid by them to the said master of the Parthian as aforesaid.

23. The average length of a voyage of a vessel of the same class as the Parthian from Sunderland to Alexandria, is two months.

The questions for the opinion of the court are,—first, whether, under the circumstances before set out, the plaintiff was at the time when the captain of the Parthian refused to deliver her cargo entitled to have the said cargo delivered to him on payment of the balance of the freight, after deducting the 301*l.* 17*s.* 6*d.*,—secondly, whether, assuming the plaintiff to be entitled to recover in respect of the said refusal to deliver, he is entitled to recover anything as damages but

the damage sustained by him by being deprived of the possession of the cargo from the time of the said refusal to the time of the cargo being delivered to him.

If the court should be of opinion upon both points in the affirmative, then the plaintiff was to have judgment for the sum of 311*l.* 17*s.* 6*d.*, with costs. If the court should be of opinion upon the first point in the affirmative, and upon the second point in the negative, then the plaintiff was to have judgment for 10*l.*, with costs. If the court should be of opinion upon the first point in the negative, a nonsuit was to be entered.

**Mellish*, Q. C. (with whom was *Bidder*), for the plaintiff.(a)— [*465
The first question is, whether the defendant had a lien on the cargo for that portion of the freight of the coals which was represented by the bill of exchange, which had not arrived at maturity when the ship reached Alexandria. The plaintiff, as endorsee of the bill of lading, on which was endorsed a receipt for one-half of the charter freight, claimed the coals on payment of the remaining half. The master, acting for his owner, refused to deliver any part of the cargo unless the whole of the freight was paid or guaranteed. At this time the bill of exchange which De Mattos, *the charterer, had given [*466 for one-half of the freight, was still running, and in the hands of a third person. The question is, whether that refusal of the master to deliver was not a conversion. If the bill had become due and had been dishonoured before the refusal to deliver the goods, the court would have had to determine whether or not they would follow the decision of the Privy Council in *Kirchner v. Venus*, 12 Moore's P. C. 361, where that court, adopting the principle laid down in *How v. Kirchner*, 11 Moore's P. C. 21, but repudiating the authority of *Gilkison v. Middleton*, 2 C. B. N. S. 134 (E. C. L. R. vol. 89), held, after much consideration, that, where freight is by the contract payable at the port of loading, the owner thereby agrees to abandon his lien on the cargo, notwithstanding the shipper has failed to comply with the condition. [WILLES, J.—The Privy Council seem to have thought they were acting in opposition to *Gilkison v. Middleton*, but in truth they were not. There were two previous cases, in one of which, *Neish v. Graham*, 8 Ellis & B. 505 (E. C. L. R. vol. 92), such a payment was treated as freight, and in the other, *Blakey v. Dixon*, 2 Bos. & P. 321, as not being freight proper. The question decided

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That, on the ship's arrival at Alexandria, the defendant had no lien on the cargo for the 301*l.* 17*s.* 6*d.*, the amount of freight in respect of which she had agreed to take and had taken the bill of exchange accepted by De Mattos:

"2. That, the defendant having pro tanto waved her lien by taking the said bill, and the ship having arrived at Alexandria, and the plaintiff's right to the delivery of the cargo having accrued, the defendant's lien in respect of the amount of freight for which the said bill was given could not and did not revive upon the insolvency of De Mattos and the probable or possible future dishonour of the bill:

"3. That the defendant having held out to the plaintiff that she had received the sum of 301*l.* 17*s.* 6*d.* on account of the freight, and the plaintiff having settled with De Mattos on that footing, she cannot now be heard to say that she did not so receive it:

"4. That, the question in effect being whether the plaintiff or the defendant is to bear the loss occasioned by De Mattos's insolvency, the defendant, who gave the credit, must be the loser:

"5. That the plaintiff is entitled to recover the aforesaid sum of 301*l.* 17*s.* 6*d.*, which he was wrongfully compelled to pay in order to obtain possession of the cargo, as well as damages for its wrongful detention; and his right to recover was not under the circumstances altered or affected by the eventual dishonour of De Mattos's acceptance."

in *Gilkison v. Middleton* does not arise here: that case was in truth only an affirmance of *Blakey v. Dixon*. There is no express lien clause here.] *Kirchner v. Venus* does conflict with *Neish v. Graham*. The court there did not attend to the distinction between that case and *Gilkison v. Middleton* now pointed out. It is impossible to contend that the owner could have any lien here. The next question is, what is the proper measure of damages. When delivery of the cargo was demanded, it was refused unless the full freight was paid or guaranteed. If the plaintiff had paid the money under protest, he would undoubtedly have been entitled to recover it back as money #467] had and received to his use. How is his *position altered by his having procured *Barker & Co.* to give a guarantee? [WILLES, J.—The defendant has got the whole freight: if the plaintiff was not liable as to the moiety, surely he may recover it back.]

Manisty, Q. C. (with whom was *Lewers*), for the defendant.(a)—All

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the stipulation in the charter-party, that the shipowner should insure the amount of half the freight, clearly indicates the intention of the parties, that the charterer's acceptance should not be a part payment in lieu of freight strictly so called, but a mere loan by the charterer to the shipowner not affecting in any way the shipowner's right of lien for the full chartered freight on the arrival of the ship at Alexandria; and that the opposite construction on which the plaintiff must rely, viz., that the said acceptance was to be a part payment in lieu of freight strictly so called, and as such a waiver of lien pro tanto, involves the unwarrantable hypothesis that the charterer and shipowner contracted that the shipowner should do that which it was not legally competent for him to do, viz., that he should insure freight which ex-hypothesi would at the time of effecting such insurance have been already paid to him, and which therefore could be under no risk from any of the perils proposed to be insured against:

"2. That the former part of the charter, which prescribes the shipowner's duty, imposed no obligation upon the defendant, to deliver the cargo except on payment of full freight; and that the consignee's liability under the charter, as consignee, and his consequent right to deduct advances, did not arise until the complete delivery to and acceptance by him of the cargo:

"3. That, on *De Mattos's* suspension of payment, the defendant was entitled to exercise a lien against the plaintiff for the full amount of the chartered freight:

"4. That the term 'advances' in the clause stipulating that the freight was to be paid on 'unloading and right delivery of the cargo, less advances in cash,' is inapplicable to an acceptance which was already in effect dishonoured at the time when such deduction had to be made, that is to say, upon the unloading and right delivery of the cargo; and that, either on the supposition of the said acceptance being a loan, or of its being a conditional payment of freight in advance, the plaintiff was not entitled to deduct the amount of the said acceptance from the full chartered freight under the name of an 'advance,' but, on the contrary, there being then nothing to be deducted under the name of an 'advance,' the plaintiff by virtue of the clause above mentioned was bound to pay the full charter freight:

"5. That, even assuming the acceptance to have been a part payment of freight in advance, nevertheless, express reference being made to the terms of the charter-party both in the endorsed receipt and in the bill of lading itself, the plaintiff had due notice before the endorsement of the bill of lading to him that the said receipt was not a receipt for a cash payment in satisfaction and discharge of half the chartered freight, but only a receipt for a conditional payment, liable to be defeated by the dishonour of the bill, or by the release and discharge of the charterer therefrom by bankruptcy or otherwise; and that the said receipt therefore could not operate to curtail the liability which the defendant took upon himself as endorsee of the bill of lading, to pay the charter freight, whatever such freight might prove to be:

"6. That *De Mattos* would not have been entitled on the arrival of the ship at Alexandria on the 5th of January, 1864, to deduct the amount of the said acceptance from the full charter freight, inasmuch as he had on the previous day, viz., the 4th of January, 1864, executed a deed under the 192d section of the Bankruptcy Act, 1861, whereby he was effectually released from all liability to be sued upon the said acceptance, the said deed operating by relation to the date of the delivering of the same; that the defendant would have been entitled to exercise a lien against *De Mattos* under these circumstances for the full amount of the charter freight; and that the defendant's rights against the plaintiff, as endorsee of the bill of lading, were on the arrival of the ship at Alexandria, by virtue of the Bill of Lading Act, 18 & 19 Vict. c. 111,

about the bargain between the *plaintiff and De Mattos may be dismissed from the case: the defendant was ignorant of that arrangement. Her right depends upon the charter-party and the bill of lading. By the former, the clear intention of the parties was, that the freight should be paid at the port of *delivery, less something. Has the shipowner, by taking a bill payable at a distant date, waived or precluded herself from setting up her common-law right of lien? What is the contract? "The freight to be paid on unloading and right delivery of the cargo, less *advances in cash, at current rate of exchange. One-half of the freight to be advanced, by freighter's acceptance, at three months, on signing bills of lading. Owner to insure the amount, and deposit with charterer the club-policy, and to guarantee same." The words "in cash" in most charter-parties are followed by the words "for ship's use." Here those latter words are struck out. [WILLES, J.—The object of the shipowner was, to obtain a negotiable instrument. Is the discounter of the bill to have the lien?] This was not the case of a payment out and out; (a) but an advance, to be repaid by the shipowner in the event of the ship being lost,—apart from the question about the policy. The charter-party contemplates the shipowner having an interest in that portion of the freight. All that *How v. Kirchner* and *Kirchner v. Venus* *establish, is, that the shipowner's lien is gone, where he enters into a contract which is inconsistent with it. [WILLES, J.,

co-extensive with her rights against De Mattos; and that she was at the said time accordingly entitled to exercise a co-extensive lien against the plaintiff on his refusal to pay the full charter freight:

"7. That the guarantee so given as above mentioned operated as an accord and satisfaction of all then-existing claims on the part of the plaintiff against the defendant in respect of the said freight and detention, and amounted to an agreement on both sides that the cargo should be delivered to plaintiff without prejudice to his liability for full freight, and that Barker & Co. should hold the full freight in their hands until the plaintiff's liability to pay the same was decided by a competent tribunal; and that the payment by the plaintiff under pressure of legal proceedings taken to determine such liability, was an admission of the defendant's right to full freight, by which the plaintiff is now concluded:

"8. That the coals carried by the defendant's vessel were on their shipment at Sunderland the plaintiff's coals, and the full freight thereof was therefore primarily the plaintiff's debt, and was on the 6th of January the plaintiff's debt notwithstanding that De Mattos's bill was then running; that any liability of De Mattos under the charter, or upon his acceptance, was only collateral to the plaintiff's primary liability; and that the defendant's remedies thereon were not in substitution of, but only collateral to the defendant's lien and other remedies:

"9. That, assuming the detention of the cargo from the 6th to the 20th of January not to have been justified on any of the grounds above mentioned, the defendant will contend that the sum of 301*l.* 17*s.* 6*d.* paid under the said guarantee in alleged excess of what was due for freight on the arrival of the ship at Alexandria, forms no element of the damages legally recoverable from the defendant in respect of the said detention,—first, because the full amount of the freight had at the time of the payment under the guarantee become payable by the plaintiff, the dishonour of the said acceptance having preceded the date of such payment, and the plaintiff's liability accordingly to the full chartered freight had revived,—secondly, because the said guarantee was given without protest, and, in the absence of any suggestion to the contrary, must be taken to have been made with full knowledge of all the facts, and the payment which was so made under the said guarantee stands in the same position as a payment made without protest and with full knowledge of all the facts,—thirdly, because the said payment was made after and in consequence of the commencement and prosecution of legal proceedings instituted for the enforcement of the same,—fourthly, that the plaintiff's repayment to Barker & Co. of the said amount (which repayment alone gives a colour to his claim for damages in respect of the said sum) was too remotely and indirectly consequent upon the defendant's refusal to deliver the cargo, to form an element of damage in respect of such refusal."

(a) See *Frayes v. Worms*, *antè*, p. 159.

referred to *Alsager v. The St. Katharine's Dock Company*, 14 M. & W. 794. There, a charter-party stipulated that the ship should proceed from London to Bombay, and, being there loaded, should proceed to London, and discharge in any dock the freighters might appoint, and deliver her cargo "on being paid freight at and after the rate of 4*l*. per ton," &c. By a subsequent clause it was stipulated that the freight was to be paid "on unloading and right delivery of the cargo, in cash, two months after the vessel's inward report at the Custom House." And it was held, that, upon the construction of these stipulations, taken together, the freight was not payable until two months after the inward report; and that the shipowner had not, after the cargo was discharged pursuant to the charter-party, any lien thereon for the freight.] Then, before the goods are delivered, De Mattos has become bankrupt, and has virtually dishonoured his acceptance. Knowing that, the master declines to deliver the cargo without payment of the freight, or a guarantee of payment. The money is not paid under protest. But, to put an end to the dispute, Barker & Co. (acting probably as agents for the plaintiff) give the master an absolute undertaking to pay the freight in consideration of his delivering them the cargo. The cargo having been delivered upon the faith of this undertaking, an action is brought against Barker & Co. upon their guarantee, in which action they might have raised, and were bound to raise, the defence now set up. They decline to do so, but submit to a judgment. According to all the principles laid down in the cases referred to in the notes to *Marriott v. Hampton*, 2 Smith's Leading Cases, 5th edit. p. 356, the money so paid cannot be recovered back. [*472] [WILLES, J.—That *might be a very good answer to an action to recover back the money: but this is an action for the wrongful conversion of the plaintiff's goods.] Changing the form of action cannot vary the rights of the parties. The plaintiff cannot be in a better condition than if he had paid the money, and was seeking to recover it back. This is, in truth, an indirect mode of seeking to obtain that which could not be obtained directly.

Mellish, in reply, was stopped by the court.

WILLES, J.—This case has been very fully and ably argued on both sides: and the court has also had an opportunity, before hearing the conclusion of Mr. Mellish's argument, of considering the matter. The result is that we think the plaintiff is entitled to judgment. The first and general question is, whether the shipowner, under the circumstances which have arisen here, and having regard especially to the insolvency of De Mattos, the charterer, had a lien on the goods for the freight, not only as to the half which was payable at Alexandria, but also as to the half which had been paid by a bill of exchange at three months, in pursuance of the terms of the charter-party, for which the shipowner stipulated in these terms,—“The freight to be paid on unloading and right delivery of the cargo, less advances, in cash, at current rate of exchange. One-half of the freight to be advanced by freighter's acceptance at three months, on signing bill of lading. Owner to insure the amount, and deposit with charterer the club-policy, and to guarantee same.” The vessel was loaded, and proceeded on her voyage. The acceptance was given for 30*l*. 17*s*. 6*d*., the half-freight, and became due on the 3d of February, 1864. The vessel

arrived at Alexandria in the early part of January. In the meantime De Mattos had *become insolvent; and it may be assumed that the bill would not be honoured by him, but that [*473 the holder would only receive a dividend upon the amount from De Mattos's estate. Before the bill became due, the consignee under a bill of lading which by the authority of the shipowner intimated that one-half of the freight had been paid as per charter-party, demanded delivery of the cargo, and offered to pay the remaining half of the freight. The master, having received intelligence of the stoppage of De Mattos, refused to deliver the cargo except on payment of the full amount of the charter freight,—that is, the half freight which was to be paid on delivery of the cargo at Alexandria, and also a sum equivalent to the amount of the acceptance given by De Mattos. In other words, he claimed on behalf of his owner to be entitled not only to the conditional payment by the charterer's acceptance, but also to have the same amount over again in cash. Under these circumstances, a jury would unquestionably find that there had been a conversion of the goods by the master as agent for the owner in the course of his employment and for the benefit of his owner. Matters so stood for a week or ten days; the master persisting in his refusal to deliver the cargo unless he received payment of the full freight in cash, or a guarantee for the same. The plaintiff, in order to obtain the cargo, yielded to the captain's demand, and caused his agents, Barker & Co., to give the master an undertaking, that, on delivery of the cargo to the plaintiff or his order, they would on demand pay or cause to be paid to him the full freight due and payable in respect of the cargo. Looking at the circumstances under which that guarantee was given, it manifestly was intended to be applied not only to the half freight which remained to be paid in Alexandria, but also to the moiety which was secured by De Mattos's *acceptance. The guarantee [*474 having been given, the master proceeded to deliver the cargo, and the delivery was completed on the 13th of February, ten days after the acceptance became due and was dishonoured. This latter circumstance could not be relied on as giving any new right: there had been a demand and refusal before that day. Subsequently, the master insisted upon being paid the full freight. Barker & Co. were advised to resist the claim; and a suit was brought against them by the master in the Consular Court upon their guarantee. On consideration, they did not think fit to raise the present defence, but submitted to a judgment, and paid the amount in dispute (the amount of the bill, I assume), under protest. The question is, whether the plaintiff is entitled to recover that money from the shipowner,—I do not say *back*, because that would, as I conceive, be limiting his rights. I think he is entitled to recover that money from the shipowner. In order to determine that question, it will be necessary in the first place to see what were the rights of the parties under the charter-party,—whether the master was right in detaining the cargo for the full freight. Assuming that the owner's lien did not extend to the moiety of the freight in respect of which the bill was given, there will arise another question, viz., whether the subsequent transactions varied the rights of the assignee of the bill of lading. As to the construction of the charter-party, I cannot entertain any doubt that the correct con-

struction of the clause relating to the payment of freight,—“The freight to be paid on unloading and right delivery of the cargo less advances in cash at current rate of exchange,”—is this, viz., that the words “in cash” are not to be read as qualifying “advances,” but are to be read in connection with the subsequent words, “at current rate of exchange.” It is said that mercantile men would read them *otherwise: but we can derive no assistance from mercantile *475] usage; none is stated in the case. If we were to read the clause, “less advances in cash,” then there is nothing in the charter-party to which it can be applied; for, there is no stipulation for advances. The document which was handed up to us during the argument deals with “advances for ship’s use.” To read in “for ship’s use” would not only be nonsense, because the charter-party makes no provision for such advances, but it would be manifestly contrary to the intention of the parties, for, those words, which stood in the printed form, are actually struck out. Not only does this charter-party not deal with advances in cash, but it deals with advances not in cash; for, the very next clause is as follows:—“One-half of the freight to be advanced by freighter’s acceptance at three months, on signing bill of lading.” In order, therefore, to give effect to the intention of the parties as expressed in this instrument, we must refer “advances” to the only advance that is mentioned in it, and read the clause thus,—“Freight to be paid on unloading and right delivery of the cargo (less advances) in cash at current rate of exchange.” That will make the whole sensible, and will give effect to every word used, and will not be inconsistent with that which is a common mercantile transaction. The shipowner says to the charterer,—“You shall pay one-half of the freight three months after the date of the bill of lading, and you shall give me for that a bill of exchange which I can negotiate in the meantime.” Mr. Manisty’s argument on the other branch of the clause has had the effect of preventing me from giving any opinion upon the question whether that advance was properly a loan to be restored in cash if no freight should be earned, or whether in that event the loss should fall upon the charterer, he being satisfied *476] with the security *of the club-policy. If it were necessary to give any opinion upon that point, I should like to consider whether the true meaning of that was, that the freight to that extent should be at the risk of the shipowner, or (which is the tendency of my present impression) at the risk of the charterer. But I give no opinion upon that, because I think credit was given to the charterer for half the freight. That credit did not expire until the 3d of February: and the demand and refusal took place before that day. For these reasons, I am of opinion, that, unless his rights are affected by what took place at Alexandria, the plaintiff was entitled to sue as for a conversion of the cargo. A jury would undoubtedly find that the master did what he did as the servant of the shipowner. *Primâ facie*, a person whose goods are converted has a right to recover the value of them: and a person whose goods are detained on an unfounded claim of lien may pay the sum claimed and take his goods. The distinction between a payment or a transaction in the nature of a payment, and a contract entered into to relieve goods from a state of restraint or duress, is maintained by numerous authorities, some of which are

referred to in the note in Byles on Bills (8th edit.) 101. If the plaintiff here had paid the whole freight in order to obtain the delivery of the goods, no doubt he might have recovered back the sum paid in excess. That course, however, was not pursued. The master gave him the alternative of a guarantee. That was obtained from Barker & Co. Now, Messrs. Barker & Co. were not the persons who were entitled to demand the delivery of the coals. They enter into a fresh contract, in consideration of the master agreeing at their request to deliver the cargo to the plaintiff, to pay him in cash, as soon as he should have delivered the cargo, the full amount of freight due to him in *respect of such cargo,—which means the whole of the freight. Barker & Co. were indemnified by Tamvaco, their [*477 principal. I adopt the argument of Mr. Manisty on this point. I assume that this was a document which rendered it obligatory on Barker & Co. to pay the whole freight, and therefore that the settlement of the action against them in the Consular Court was well advised. Suppose, instead of undertaking to pay the freight, Barker & Co. had undertaken to deliver to the captain a diamond of great price; the latter having done that which was the consideration for their promise, could Barker & Co. have excused themselves for the non-performance of it? Clearly not. The question between the parties was, whether or not Barker & Co. had come under an engagement to pay the whole charter freight. I think the answer to that question must have been in the affirmative, and consequently that Barker & Co. acted properly in declining further to contest the matter. Then it was insisted, that, regard being had to the contract between Barker & Co. and the defendant, and the action brought upon it, and the acquiescence of Barker & Co. in that claim, the money so paid cannot be recovered back. The master had refused to deliver the goods unless and until he received payment or a security was given to him, not only in respect of what was really due, but also in respect of a sum which he was not entitled to. What is the real character of the transaction? Was it the settlement of a dispute, and so binding and final? The contract certainly was binding and final to this extent, that the master was to receive the whole freight. But, was it binding and final so as to entitle the defendant to retain a sum of money which had been extorted from the plaintiff, and which the latter had been compelled to pay in order to obtain the goods? It would be an abandonment, and not a *settlement. The transaction speaks [*478 for itself. It was never intended that the master should be either in a better or a worse position by taking the guarantee than if he had received the money at the time. That is the judgment of good sense. What is the judgment at law? Clearly the same. *Prima facie*, in an action for the conversion of goods, the plaintiff gets their value: but, if the goods have been given up, that may be taken into account in reduction of damages. Here is a middle case. The goods have been given up, but in a course of dealing whereby the plaintiff is 301*l.* 17*s.* 6*d.* out of pocket. A jury would be entitled to take that into their consideration in assessing the damages. I therefore think the plaintiff is entitled to judgment for the larger sum.

BYLES, J.—I am of the same opinion. It is unnecessary to draw any subtle distinctions as to the meaning of "freight." Whatever it

means, it is quite clear, that, if a bill of exchange is taken for freight, which bill becomes due after the commencement of the voyage, but before the goods are deliverable, no lien exists in respect of that: *Horncastle v. Farran*, 3 B. & Ald. 497 (E. C. L. R. vol. 5); *Alsager v. The St. Catharine's Dock Company*, 14 M. & W. 794. That being so, here was an advance in the nature of a prepayment of half the freight by a bill of exchange payable at a distant day. On that bill becoming due, and being dishonoured, the debt would revive. But it is one thing to say that the debt revives, and another to say that the lien for freight revives. This bill was not dishonoured at the arrival of the time for the delivery of the goods. There is no authority for the application of the doctrine of stoppage in transitu to such a case. By duress of his goods, the plaintiff is obliged to give a guarantee for payment of the whole freight. It is unnecessary to *479] say whether or not there was a sufficient *consideration for that guarantee. It seems to me that the real meaning of the transaction is this,—“If you (the master) will deliver me the cargo, I will pay you the whole freight; and you shall be the depositary of the money, to await the determination of the rights as between your owner and myself.” That seems to me to be the fair result. The plaintiff by his agents performs the agreement, and pays the money under protest. I have attended very carefully to the argument, and I must say I think the case a very plain one.

MONTAGUE SMITH, J., having been at Chambers during a portion of the argument, took no part in the judgment.

Judgment for the plaintiff for 811*l.* 17*s.* 6*d.*

Waiver of a lien for freight is a question of intention. It may be made by express contract, or implied from the inconsistency of the time and place of payment of the freight with the right of lien, as where such payment is, by agreement, postponed far beyond or at variance with the time and place for the delivery of the goods: 3 Kent 221; *Raymond v. Tyson*, 17 How. (U. S. 1854) 53; *Schooner Volunteer*, 1 Sumn. (U. S. C. C. 1834) 551; *Chandler v. Belden*, 18 Johns. (N. Y. 1820) 157; *Brown v. Howard*, 1 Cal. (1857) 423; *Abbott on Shipping* 300; 1 Pars. on Mar. Law 144; or the delivery is unconditional: *Bags of Linseed*, 1 Black (U. S. 1861) 108; *The Kimball*, 3 Wall. (U. S. 1865) 37. In the last case, the charter-party for a chartered vessel was in the usual form. A portion of the freight was paid; the “balance” was payable one-half in “five,” and the other in ten days after unloading of cargo, which unloading was to take place within reach of the ship’s tackle. The charterers gave them notes on account of charter, payable about the time of delivery. The owner of the vessel used the notes, but on the failure of the charterers tendered them back; but the charterers refused to receive them. It was held—1. That the lien for freight was not waived; 2. Nor were the notes payment of the freight. See ante, p. 85, note to *Boaler v. Mayor*.

LAY v. MOTTRAM. *June 26.*

1. A recital in a deed may amount to a covenant, where it appears to be the intention of the parties that it should do so.

2. A composition deed under the 192d section of the Bankruptcy Act, 1861, professing to be made between the debtor, a surety, and all the creditors (whether assenting or bound under the statute), recited, amongst other things, that the debtor had agreed to pay his creditors 5s. in the pound upon their debts by two instalments of 2s. 6d. in the pound each, the first in cash, the second by the joint and several promissory notes of the debtor and the surety, at four months' date; and that the statutory majority of creditors had consented to accept such composition. It then witnessed, that, in consideration of the premises, the several creditors released the debtor (in the largest possible terms) from all debts, claims, and demands, "save and except their rights, claims, and demands under and by virtue of this deed, and of the said promissory notes for the second instalment of the said composition;" with a proviso saving their remedies against third persons: and the surety covenanted not to accept any security, preference, or benefit, until the full amount of the composition should have been paid:—

Held, that the deed amounted to an absolute release, and might be pleaded in bar as such.

THIS was an action upon three bills of exchange drawn respectively by one Barron on the 18th, 23d, and 24th of November, 1863, upon and accepted by the defendant, for 280*l.* 8*s.*, 148*l.* 19*s.* 6*d.*, and 160*l.* 8*s.* 7*d.*, respectively, each payable four months after date, and endorsed by Barron to the plaintiff: with a count upon an account stated.

*The defendant pleaded, amongst other pleas,—thirteenthly, [*480 that the defendant and Alexander Mottram accepted the said bills sued upon jointly and not otherwise, and that the said money payable mentioned in the last count was money alleged by the plaintiff to be due by the defendant and the said Alexander Mottram jointly and not otherwise; and that after the accruing of the alleged causes of action, and before this action, to wit, on the 29th of September, 1864, the defendant and the said Alexander Mottram, being indebted to divers persons, respectively, made and executed a deed, as follows.—“This deed, made the 29th of September, 1864, between Charles Mottram and Alexander Mottram, both of No. 20, Noble Street, in the city of London, merchants, partners in trade, carrying on business under the style of Mottram & Co. (hereinafter called ‘the debtors’), of the first part, Charles Mottram the younger, of, &c. (hereinafter called ‘the surety’), of the second part, and all the creditors of the debtors whether executing or assenting in writing to this deed (being a deed intended to take effect under the 192d section of the Bankruptcy Act, 1861), or being bound thereby in consequence of the same being executed or assented to in writing by a majority in number representing three-fourths in value of the creditors of the debtors whose debts respectively amount to 10*l.* and upwards, of the third part: Whereas, the debtors are jointly indebted to the several persons and companies whose names or whose trading firms and companies are set forth in the schedule hereto (and which schedule is intended to include all the creditors of the debtors) in the sums set opposite each name, firm, or company, and upon the several bills of exchange and negotiable securities mentioned in the said schedule, as they the debtors do hereby respectively admit and acknowledge, and as they the creditors do hereby *respectively declare: And [*481 whereas the debtors, being unable to pay the said debts in full, did in the month of June last suspend their payments, and gave

notice of such suspension to their creditors; and on the 29th of that month a meeting of their creditors was held at, &c., and an offer having been made by the debtors of 5s. in the pound, 2s. 6d. within six weeks, and 2s. 6d. within three months,—the last payment to be secured,—a committee of creditors was appointed to investigate the debtors' affairs, and, if they were of opinion that a composition should be accepted, they were authorized to accept a composition not less in amount than that above mentioned, and secured as they should decide: And whereas the said committee proceeded to investigate the affairs of the debtors, and have by their report of the 14th of July, 1864, recommended the creditors to accept a composition of 5s. in the pound upon their said debts, by two instalments of 2s. 6d. in the pound each,—the first of such instalments to be paid in cash, and the second of such instalments to be payable at four months' date from the 1st of August, 1864, and to be secured by the joint and several promissory notes of the said debtors and the said surety; and the said debtors have agreed to pay such composition; and the said creditors, or a majority in number representing three-fourths in value of such of them whose debts respectively amount to 10*l*. and upwards, have consented to accept such composition upon the terms hereinafter appearing: And whereas this deed has been approved by the said committee as a proper deed for carrying out the arrangement: Now this deed witnesseth, that, in consideration of the premises, they the several creditors of the debtors do and each of them doth hereby, for themselves respectively, and for their several and respective partners, release the debtors and each of them, their and #482] each of their heirs, *executors, and administrators, estate and effects, of and from all debts, sums of money, bills, bonds, notes, accounts, judgments, executions, actions, suits, claims, costs, damages, and demands whatsoever, which they respectively, either alone or jointly with their partner or partners or any other person or persons, now have or hereafter may have against them the debtors, or either of them, their or either of their heirs, executors, or administrators, estates or effects, for or in respect or by reason of the said debts, bills of exchange, and negotiable securities mentioned in the said schedule hereto, or for or by reason of any other debt, bill of exchange, negotiable security, damages, liability, claim, or demand whatsoever, save and except their rights, claims, and demands under and by virtue of this deed, and of the said promissory notes for the second instalment of the said composition: Provided always, and it is hereby expressly declared that nothing herein contained shall in any way prejudice or affect the rights or remedies of any creditor or creditors against any person or persons, or the property of, or any security given by, any person or persons other than the debtors, or the rights or remedies of any creditor or creditors in respect or upon any security given to or held by them or any of them upon or against any part of the estates and effects of the debtors, which but for these presents they might have resorted to: And this deed also witnesseth, that, in consideration of the premises, he the surety doth hereby, for himself, his heirs, executors, and administrators, covenant with the said creditors respectively, their respective executors, administrators, and partners, that he the surety will not do or cause or require to be

done any act or thing whereby he or they may obtain any security, preference, or advantage whatsoever, nor will he or they accept any security, preference, or benefit whatsoever from the *debtors, [*483 or either of them, or over or upon the estate of the debtors or of either of them, or over or upon any part thereof respectively, in respect of his said suretyship, until the full amount of the said composition shall have been paid. In witness," &c. Averment, that a majority in number representing three-fourths in value of the creditors of the defendant and the said Alexander Mottram whose debts respectively amounted to 10*l.* and upwards, did in writing assent to and approve of the said deed; that the execution of the said deed by the defendant and the said Alexander Mottram(a) was attested by an attorney and solicitor; that, within twenty-eight days from the day of the execution of the said deed as aforesaid, and before the commencement of this action, the said deed was produced and left (having been first duly stamped) at the office of the chief registrar of the Court of Bankruptcy for the purpose of being registered, and together with the said deed there was delivered to the said chief registrar such affidavit by the defendant and the said Alexander Mottram as by the Bankruptcy Act, 1861, in that behalf is provided, that the said deed did before the registration thereof have such ordinary and ad valorem stamp duties as by the said act in that behalf are provided; that the plaintiff was a creditor of the defendant and the said Alexander Mottram, in respect of the claim herein pleaded to, at the time of the execution of the said deed by the defendant and the said Alexander Mottram; and that, all conditions prescribed by the said act having been observed and performed, and all things having happened necessary in that behalf, the plaintiff became and was and is bound by the said deed, as if he had been a party thereto and had duly executed the same.

*To this plea the plaintiff demurred, the ground of demurrer [*484 stated in the margin being, "that the deed pleaded is no bar to the action, and contains unreasonable covenants, and is inoperative against non-assenting creditors." Joinder.

Philbrick, in support of the demurrer.(b)—There is no averment in the plea that the first instalment of the composition was paid or tendered in cash, or that the promissory notes for the second instalment were given or tendered. Looking at the form of the deed, in which

(a) There is no averment that the surety executed the deed. But this Willes, J., suggested might be cured by an amendment.

(b) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the deed pleaded is no bar to the action, and contains unreasonable covenants, and reasonable, proper, and necessary covenants are absent:

"2. That it is inoperative as against dissentient creditors, as it contains an absolute and unconditional release, without any covenant to pay the composition by the debtor or to give the promissory notes by the surety:

"3. That the plea is bad, for containing no averment that the composition mentioned in the deed had been paid or tendered:

"4. That the release is inoperative and null until the composition be paid or tendered; and under the deed a dissentient creditor has no remedy for it:

"5. That the non-assenting creditors are by the deed placed in a worse position than those who assent thereto:

"6. That there is no covenant or agreement at all binding the debtor in the said deed; and that all the surety is bound to do the law would imply."

there is no covenant by the debtors to pay the money, and no covenant by the sureties to give the notes, except such as may be implied from the recital, a dissentient creditor cannot be bound by it. [WILLES, J.—The recitals amount to a covenant: *Farrall v. Hilditch*, 5 C. B. N. S. 840 (E. C. L. R. vol. 94).] The release can have no operation until payment or tender; and there is no averment of either: *Fessard v. *Mugnier*, 18 C. B. N. S. 286 (E. C. L. R. vol. 114). There, *485] an averment of the defendant's readiness and willingness to pay or tender was held not to be equivalent to an averment of payment or tender, notwithstanding the plea contained a general averment of performance of all conditions precedent, &c. Here, the plea does not even aver readiness and willingness. [BYLES, J.—The release there was unqualified, and would have discharged joint-contractors and sureties. That is provided against here. WILLES, J.—The release in *Fessard v. Mugnier* was subject to a defeasance, if the composition was not paid. Here, if the composition is not paid, the creditors must look to their remedies under the deed: but the release is a general and absolute release. MONTAGUE SMITH, J.—The true construction is, that the covenant of the debtor and of the surety is accepted in satisfaction.] The deed is clearly unreasonable: it contains no provision to enable a dissentient creditor to enforce payment of the composition, if it be improperly withheld. [MONTAGUE SMITH, J.—If the words of the instrument are sufficient to create a covenant, he has his remedy on the deed.]

Hayes, Serjt., contra, was not called upon.

WILLES, J.—I am of opinion that our judgment in this case should be for the defendant. The deed set out in the plea is a deed of composition pursuant to the 192d section of the Bankruptcy Act, 1861, and is so framed and executed as to be binding upon all the creditors. It professes to be made between the debtors of the first part, Charles Mottram the younger (as surety) of the second part, and "all the creditors of the debtors, whether executing or assenting in writing to this deed (being a deed intended to take effect under the 192d section of the Bankruptcy Act, 1861), or being bound thereby in consequence *486] of the same *being executed or assented to in writing by a majority in number representing three-fourths in value of the creditors of the debtors whose debts respectively amount to 10*l.* and upwards," of the third part. The deed then recites certain matters which resulted in a meeting of the creditors, the appointment of a committee to investigate the affairs of the debtors, that the committee proceeded to investigate, and by their report recommended the creditors to accept a composition of 5*s.* in the pound upon their debts, payable by two instalments of 2*s.* 6*d.* in the pound each, the first in cash, the second by the joint and several promissory notes of the debtors and the surety at four months' date. The plea does not aver that the deed was executed by the surety: but that may be amended. The deed then goes on to recite that the debtors had agreed to pay such composition, and that the creditors, or a majority in number representing three-fourths in value of such of them whose debts respectively amounted to 10*l.* and upwards, had consented to accept such composition. It then proceeds to state that the several creditors released the debtors in the most general terms possible, saving their

remedies under the deed or against third persons. Then comes an express covenant by the surety against his receiving any preference or benefit in respect of his suretyship until the full amount of the composition should have been paid. The very statement of the deed is enough to show the effect of the transaction to be, that the creditors were satisfied to discharge the debtors from their debts, in consideration of the covenant entered into by them and their security. Whether the true construction of the deed be that it amounts to a release or merely to an accord and satisfaction or a covenant not to sue, is immaterial, because, inasmuch as it is absolute and unconditional, the release or the covenant not to sue would be a bar *to any action [*487 for the original debt. Mr. Philbrick says the deed is unreasonable and not binding on dissentient creditors, because no remedy is given them for the composition. But I think the case of *Farrall v. Hilditch*, 5 C. B. N. S. 840 (E. C. L. R. vol. 94), furnishes a complete answer to that argument: it shows that the recital that the debtors had agreed to pay the composition amounts in law to a covenant to pay the composition as agreed. The creditors, therefore, agree to let off the debtors, in consideration of the payment of a composition of 5s. in the pound by two instalments, at the times agreed on. That puts an end to their claim for their original debts. For these reasons, I am of opinion that there must be judgment for the defendant.

BYLES, J.—I am of the same opinion. This is, I believe, the second deed under the statute which has been held to be good. In *Strick v. De Mattos*, 33 Law J., Exch. 276, Martin, B., says "There are four things settled with regard to these deeds,—first, they may be pleaded in bar,—secondly, they may be pleaded in bar without a *cessio bonorum*,—thirdly, there must be a substantial equality for the creditors." As to these three, no difficulty arises here. The fourth is, "that unreasonable covenants make the deed void as against non-assenting creditors." In this deed there is a release absolute in terms and most cautiously worded to reserve the rights of the creditors as against third parties. The only difficulty which has been suggested, is, that the non-assenting creditor gets nothing in return for the release which is cast upon him. But the covenant to pay the composition is his equivalent; and the case of *Farrall v. Hilditch*, 5 C. B. N. S. 840 (E. C. L. R. vol. 94), shows that the recitals amount to a covenant.

MONTAGUE SMITH, J.—I am of the same opinion. The argument urged on the part of the plaintiff *admits, that, if the deed [*488 contains a covenant by the debtors and the surety(a) to pay the first instalment, and to give promissory notes for the second, the release is absolute and binding on all the creditors, whether assenting or not. I think that is the true construction of the deed. There is a distinct recital (which amounts to a covenant) that the debtors have agreed to pay the composition, and that the creditors (to the required number and value) have agreed to accept the same. The operative part of the deed is, that, in consideration of the premises, the several creditors released the debtors, their estates and representatives, from all debts and demands, &c. It is an absolute and immediate release of the debtors from all debts, claims, and demands whatsoever "save and except their rights, claims, and demands under and by virtue of

(a) The surety is no party to that covenant, unless it be inferentially.

this deed, and of the said promissory notes for the second instalment of the said composition:" and the exception or proviso which follows supports that construction:—"Provided always, and it is hereby expressly declared, that nothing herein contained shall in any way prejudice or affect the rights or remedies of any creditor or creditors against any person or persons, or the property of, or any security given by, any person or persons other than the debtors, or the rights or remedies of any creditor or creditors in respect or upon any security given to or held by them or any of them upon or against any part of the estates and effects of the debtors, which but for these presents they might have resorted to." And then follows the covenant by the surety which has already been adverted to. I think the deed is a perfectly good deed, and binding upon non-executing creditors.

Judgment for the defendant.

***489] *In the Matter of the Claim of ROBERT JOHN PETTI-
WARD v. THE METROPOLITAN BOARD OF WORKS.
June 26.**

In 1854, the commissioners of sewers, under the 11 & 12 Vict. c. 112, gave notice to A., the occupier of land under a lease granted by a tenant for life, that they were about to construct a new sewer across the same; and in the early part of 1855 the work was done, no notice having been given to the owner of the fee.

The Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120, passed after the work was so done, and came into operation on the 1st of January, 1856.

On the expiration of A.'s lease in 1862, B., who had succeeded to the estate on the death of the tenant for life (in November, 1855), for the first time became aware of the existence of the sewer, which it was agreed had depreciated the value of the property for building purposes to the extent of 1500*l.*:—

Held, that the liability of the commissioners of sewers to compensate B. for such damage was transferred to the metropolitan board of works by virtue of the provisions of the Metropolis Local Management Act, and that the claim was not too late.

THIS was a special case stated by an umpire to whom the claim of Mr. Pettiward for compensation under the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120, for damage done to his premises by the works of the board, was referred:—

Roger Pettiward, deceased, was in the year 1832, and thence until his death, seised in fee of certain land used as orchard and market-garden, situate in the parish of St. Mary Abbots, Kensington, in the county of Middlesex.

By his will, dated the 13th of May, 1833, he devised (inter alia) the land in question to trustees, to settle the same in manner by the said will directed.

The said Roger Pettiward died shortly after making his said will.

In 1835, the trustees of the will of Roger Pettiward executed a settlement in pursuance of the said will; and Lady Hotham under and by virtue of the said settlement became and was tenant for life of the land in question, with power of leasing the same for not more than twenty-one years.

On the 6th of August, 1841, Lady Hotham, in pursuance of the said power, granted a lease of the land in question to John Poupart, for twenty-one years from June, 1841.

On the 14th of December, 1854, the metropolitan commissioners of sewers served upon Mr. Poupart, then in occupation of the land, the following notice:—

***“Metropolitan Commission of Sewers.**

‘To Mr. John Poupart, occupier of the piece or parcel of [*490 ground hereinafter mentioned, and whom else it may concern.

“The metropolitan commissioners of sewers hereby give you notice that it has been duly ordered by the said commissioners that certain works necessary for the drainage of a portion of the area within the limits of the metropolitan commission of sewers should be executed and constructed, that is to say, the building of a certain sewer and works in connection therewith, to commence at a point near the river Thames, and near to Oremorne Gardens, in the county of Middlesex, and within the limits of the said commission, in the course and direction shown upon the plan produced to the said commissioners; and that, for the purpose aforesaid, it is necessary to lay down, construct, and carry the said sewer into, through, along, and under a certain piece or parcel of ground used as an orchard and market-garden in your occupation, in the county and within the limits aforesaid; and that, for the construction of such sewer and works as aforesaid, it is requisite and necessary that Thomas Lovick, one of the engineers of the said commissioners, Robert Tomlinson Carlisle, contractor of and with the said commissioners, and their assistants, servants, and workmen, some or one of them, should enter into and upon, lay open, and otherwise lawfully interfere with the said orchard and market-garden, with or without horses, carts, barrows, planks, and other vehicles, implements, and things, for the purpose and object aforesaid: And whereas the said T. Lovick and R. T. Carlisle have been duly authorized by the said commissioners to enter with assistants, servants, and workmen in and upon the said orchard and market-garden for the purpose of executing the said works at some reasonable *hour [*491 in the day-time, notice being first given to the occupier of the said orchard and market-garden, of the said intended entry in and upon the said orchard and market-garden, and of the purpose and object thereof, twenty-four hours at the least before such entry,— Notice is therefore hereby given that the said T. Lovick and R. T. Carlisle and their assistants, servants, and workmen, some or one of them, will on the 16th of December instant, at some reasonable hour in the day-time, enter into and upon the said orchard and market-garden for the purpose of executing the said works as aforesaid. Dated, &c.

In pursuance of this notice, the said commissioners of sewers, acting in execution of the powers vested in them by the 11 & 12 Vict. c. 112, by their servants and agents entered upon the land in question, and constructed under it a sewer, which was completed on, &c.; and, having done so, restored the surface of the land to its former condition.

Lady Hotham never had notice from any one, or knowledge of the intention to construct the sewer, or that it had been constructed.

Lady Hotham died on the 30th of November, 1855; and, upon her death, the claimant Robert John Pettiward became under the settlement hereinbefore mentioned tenant for life of the land in question;

and, at the expiration of the lease to Poupart in 1862, he entered into possession of the said land.

Mr. Pettiward thereupon determined to apply the said land to building purposes: and he accordingly caused to be prepared a plan for the erection of several houses on the property.

After this plan was completed, namely, in October, 1862, it became for the first time known to Mr. Pettiward that the sewer had been constructed under the surface of the land. The existence of this sewer *492] rendered it necessary to alter the contemplated scheme for building, and in fact diminished the value of the land to the extent of 1500*l*.

Mr. Pettiward now claims from the metropolitan board of works the sum of 1500*l*. as compensation for the damage occasioned to the said land by the construction of the sewer.

By the 11 & 12 Vict. c. 112, s. 38, power was given to the metropolitan commissioners of sewers to construct sewers under any lands whatsoever, making compensation for any damage done thereby, as thereafter provided.

By the 69th section of the same act, it was enacted that full compensation should be made out of such rates to be levied under the said act as the commissioners should by their decree direct, to all persons sustaining any damage by reason of the exercise of any of the powers of the said act: and, in case of dispute as to amount, the same should be settled by arbitration, in the manner provided by the said act.

By the Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 145, it is enacted, that, from and after the commencement of the said act, all duties, powers, and authorities vested in the metropolitan commissioners of sewers shall cease to be so vested.

By s. 146, it is enacted as follows,—“No action, suit, prosecution, or other proceeding whatsoever commenced or carried on by or against the said commissioners, shall abate or be discontinued or prejudicially affected by the determination of the power of such commissioners, but shall continue and take effect in favour of or against the metropolitan board of works in the same manner in all respects as the same would have continued and taken effect in relation to the said commissioners if this act had not been passed, and the powers of the said commis- *493] sioners had continued in full *force: and all decrees and orders made, and all fines, amerciaments, and penalties imposed and incurred respectively previously to the commencement of this act, shall and may be enforced, levied, recovered, and proceeded for, and all administrative proceedings commenced previously to the commencement of this act shall and may be continued, proceeded with, and completed, the metropolitan board of works being in reference to the matters aforesaid in all respects substituted in the place of the said commissioners.”

By section 148 it is enacted as follows,—“All property, matters, and things whatsoever vested in the metropolitan commissioners of sewers, except such sewers as are hereby vested in any vestry or district-board, and except such sewers as are not within the limits of the parishes and places mentioned in the schedule to this act, shall be vested in the metropolitan board of works; and all persons who then

owe any money to the said commissioners of sewers or to any person on behalf of such commissioners, shall pay the same to the metropolitan board of works, or as they may direct; and all moneys then due and owing by or recoverable from the said commissioners shall be paid by or recoverable from the metropolitan board of works; and all contracts, agreements, bonds, covenants, and securities theretofore made or entered into with or in favour of or by the said commissioners, and all contracts, agreements, bonds, covenants, and securities made or entered into with or in favour of or by any former or other commissioners, which under the said act of the 11 & 12 Vict. c. 112 were to take effect in favour of, against, and with reference to the said metropolitan commissioners of sewers, and are now in force, shall take effect and may be proceeded on and enforced, as near as circumstances admit, in favour of, by, against, and with reference to, the metropolitan *board of works, as the same would have taken effect and might have been proceeded on and enforced in [*494 favour of, by, against, and with reference to the said metropolitan commissioners of sewers if this act had not been passed, and the powers of such commissioners had continued in full force; and any retiring pension or allowance granted under s. 27 of the said act of the 11 & 12 Vict. c. 112, shall continue payable on the like terms by the metropolitan board of works."

By s. 225, it is enacted that "the amount of any compensation to be made under the said act by the said metropolitan board, shall unless therein otherwise provided, be settled in case of dispute by, and shall be recovered before, two justices, unless the amount of compensation claimed exceed 50*l.*, in which case the amount thereof shall be settled by arbitration according to the provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), which are applicable where questions of disputed compensation are authorized or required to be settled by arbitration."

By the Metropolis Management Amendment Act, 1862, 25 & 26 Vict. c. 102, s. 106, it is enacted that "no writ or process shall be sued out against or served upon, and no proceeding shall be instituted against, the metropolitan board of works for anything done or intended to be done under the powers of such board under the acts therein mentioned or the said act, until the expiration of one calendar month next after notice in writing shall have been served on such board; and every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards."

Mr. Pettiward, in February, 1863, gave notice to the metropolitan board of works that he desired to have his claim settled by arbitration: and, as the parties *did not concur in the appointment of a single arbitrator, he appointed Mr. Lee as an arbitrator to [*495 whom the said dispute should be referred, and requested the board also to appoint an arbitrator.

The board, by an instrument under their seal, appointed (under protest) Mr. Oakley to act as arbitrator in the matter of the said claim.

The arbitrators, before they entered upon the matters referred to them, duly nominated and appointed Mr. Hannen as umpire to decide on such matters on which they should differ, or which should be referred

to him under the provisions of the Lands Clauses Consolidation Act, 1845 : and it was agreed between the parties that he should state his award in the form of a special case, which he accordingly did, as above.

It was also agreed between the parties, that, if the court should be of opinion that Mr. Pettiward was entitled to have any sum of money awarded to him as compensation for the damage occasioned to the land in question by the constructing of the sewer, the amount of such compensation should be 1500*l.*, together with the costs of and incident to the arbitration.

If the court should be of opinion that the umpire had power, in the circumstances above stated, to award that Mr. Pettiward was entitled to have such compensation awarded to him in this arbitration, he awarded the sum of 1500*l.* as such compensation to be paid by the board to Mr. Pettiward, together with the costs of and incident to this arbitration.

If, on the other hand, the court should be of opinion that Mr. Pettiward was not so entitled, he awarded accordingly.

*496] *Watkin Williams*, for the claimant.(a)—In 1835, *Lady Hotham became entitled as tenant for life under the will of one Roger Pettiward to certain land at Kensington. In 1841, she granted a lease for twenty-one years to one Poupart. In 1854, the commissioners of sewers, acting under the 11 & 12 Vict. c. 112, gave notice to Poupart (but not to Lady Hotham) of their intention to construct a sewer under a portion of the land comprised in his lease ; and, early in 1855, they entered upon the land and did the work, paying compensation to the tenant, no doubt. Lady Hotham died in November, 1855, and Pettiward, the claimant, came in as next in remainder, subject to the lease granted to Poupart. The Metropolis Local Management Act, 18 & 19 Vict. c. 120, passed on the 14th of August, 1855, and came into operation on the 1st of January, 1856. Poupart's lease expired in 1862, and Mr. Pettiward proceeded to lay out the ground for building, when he for the first time became aware of the existence of the sewer under it. He thereupon claimed compensation : and the question now to be determined is, whether or not his claim is well founded. The act under the authority of which the sewer was constructed was the 11 & 12 Vict. c. 112. By the 7th section of that act the property in the sewers, and all rights, debts, and liabilities of the commissioners under existing commissions were transferred to the metropolitan commissioners of sewers. By s. 38, the commissioners were empowered to construct new sewers and to repair and alter, &c., the old ones. The 59th to the 62d section relate to notices to be given *497] before *commencing works, and empowering the commissioners to enter upon lands for the purposes of the act. The 69th section enacts that "full compensation shall be made out of such rates to be levied under this act as the commissioners shall by their decree direct, to all persons sustaining any damage by reason of the exercise

(a) The points marked for argument on the part of the claimant were as follows :—

1. "That the metropolitan commissioners of sewers were liable to make compensation for the injury done by the construction of the sewer to his estate and interest in the land in question :

"2. That such liability is by the Metropolis Local Management Act, 18 & 19 Vict. c. 120, transferred to the metropolitan board of works."

of any of the powers of this act; and, in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by this act (ss. 70-75); or, if the compensation claimed do not exceed the sum of 20*l.*, the same may be ascertained by and recovered before justices in a summary manner." The 76th section relates to the levying of sewer-rates, which by s. 77 may be prospective for future expenses, or retrospective for expenses already incurred; with a special provision as to expenses of permanent works. There is no rule of law which prohibits retrospective rates: see *The Hull Level Case*, 2 Stra. 1127; *The King v. The Commissioners of Sewers of the Tower Hamlets*, 1 B. & Ad. 231 (E. C. L. R. vol. 20); *Harrison v. Stickney*, 2 House of Lords Cases 108. [WILLES, J.—The old commissioners of sewers were a court of record. I have argued demurrers, and have been present at trials upon records before them.] There can be no doubt that the plaintiff would have been entitled to compensation from the commissioners, if the 18 & 19 Vict. c. 120 had never passed. [*Mellish*, Q. C.—The only question in the case that I am aware of, is, whether the liability of the commissioners under the 11 & 12 Vict. c. 112 is transferred to the metropolitan board of works.] By the 145th section of the 18 & 19 Vict. c. 120, it is provided, that, from and after the commencement of that act (the 1st of January, 1856), all duties, powers, and authorities vested in the metropolitan commissioners of sewers shall cease to be so vested. And s. 146 enacts that "no action, suit, or *other proceeding whatsoever commenced or carried on by or against the said commissioners, shall abate or be discontinued or prejudicially affected by the determination of the powers of such commissioners, but shall continue and take effect in favour of or against the metropolitan board of works in the same manner in all respects as the same would have continued and taken effect in relation to the said commissioners if this act had not been passed and the powers of the said commissioners had continued in full force; and all decrees and orders made, and all fines, amerciaments, and penalties imposed and incurred respectively, previously to the commencement of this act, shall and may be enforced, levied, recovered, and proceeded for, and all administrative proceedings commenced previously to the commencement of this act shall and may be continued, proceeded with, and completed, the metropolitan board of works being, in reference to the matters aforesaid, in all respects substituted in the place of the said commissioners." The obvious intention of the legislature was, that the metropolitan board of works should assume all the rights and be subject to all the burthens and liabilities of the old commissioners. This is made still more clear by some subsequent provisions. Section 148 enacts that "all property, matters, and things whatsoever vested in the metropolitan commissioners of sewers, except, &c., shall be vested in the metropolitan board of works; and all persons who then owe any money to the said commissioners of sewers, or to any person on behalf of such commissioners, shall pay the same to the metropolitan board of works, or as they may direct; and all moneys then due and owing by or recoverable from the said commissioners shall be paid by or recoverable from the metropolitan board of works; and all contracts, agreements, bonds, covenants, and securities heretofore

*499] *made or entered into with or in favour of or by the said commissioners, and all contracts, agreements, bonds, covenants, and securities made or entered [into] with or in favour of or by any former commissioners, which under the 11 & 12 Vict. c. 112 were to take effect in favour of, against, and with reference to the said metropolitan commissioners of sewers, and are now in force, shall take effect and may be proceeded on and enforced, as near as circumstances admit, in favour of, by, against, and with reference to the metropolitan board of works, as the same would have taken effect and might have been proceeded on and enforced in favour of, by, against, and with reference to the said metropolitan commissioners of sewers, if this act had not been passed, and the powers of such commissioners had continued in full force." The 180th and 181st sections contain provisions for discharging existing liabilities of boards or bodies having powers of paving, &c., and of the metropolitan commissioners of sewers. The latter enacts, that, "notwithstanding the determination or expiration of the said act of 11 & 12 Vict. c. 112, all mortgages, annuities, securities, and other debts and liabilities which at or immediately before such determination or expiration may be a charge on or payable out of all or any of the rates authorized to be levied thereunder, shall continue in full force, and be a charge on the districts or parts in which such rates would have been authorized to be levied in case such act had continued in force;" and that "the sums from time to time becoming payable under or required for payment of the said mortgages, annuities, securities, debts, and liabilities shall be raised by the metropolitan board of works in such districts or parts in like manner as the expenses of such board in the execution of this act." When this act passed, Mr. Pettiward had a claim upon *500] *the commissioners which would be a charge upon the rates; and the language of the clauses above referred to is sufficiently comprehensive to transfer that liability to the newly created board. The point suggested as to the limitation of the time for bringing the action is frivolous.

Mellish, Q. C. (with whom was *Raymond*), for the board.(a)—In order to pass on the liability to the metropolitan board of works under the 18 & 19 Vict. c. 120, the claim should have been preferred in the time of the commissioners under the former act; it must be a claim

(a) The points marked for argument on the part of the board were as follows:—

"1. That the compensation which might have been claimed from the former commissioners of sewers by the owner to whose rights Mr. Pettiward has succeeded, but which was not assessed nor claimed before the coming into operation of the Metropolis Local Management Act, was not nor is 'moneys which were due or recoverable from the commissioners,' and is therefore not recoverable from the board:

"2. That, inasmuch as it was expressly directed by the act of 11 & 12 Vict. c. 112, that the compensation was to be paid out of rates to be levied under that act, and to be imposed by the commissioners, no fund now exists or can be created out of which the compensation awarded can be paid, and that it would be unjust and unreasonable to burden existing rate-payers with the payment of a compensation in respect of acts done eight or nine years before:

"3. That the proceedings by arbitration under the powers and provisions of the Metropolis Management Act were not nor are applicable to a claim for compensation arising out of acts done before the coming into operation of that act:

"4. That more than six months having elapsed since the accrual of the ground of claim before any proceeding was instituted against the board, the right to compensation, if any, was barred."

for moneys numbered. There is no provision for the transfer of causes of action for unliquidated damages, unless proceedings had been actually *commenced. [BYLES, J.—This is a liability to pay compensation. WILLES, J.—And a charge upon the [*501 rates.] The 145th section expressly provides, that, “in the meantime and until the commencement of the act, the metropolitan commission of sewers, and the act of 11 & 12 Vict. c. 112, and the acts amending the same, shall continue in force.” There was, therefore, a time within which this claim might have been made. If any such proceedings had been commenced, they would have been kept alive by virtue of the provision in s. 146. [BYLES, J.—The 148th section vests everything in the new board: it strips the old commissioners naked, and transfers all property, matters, and things, and all contracts and agreements, to the newly created body.] That and the 182d are undoubtedly the material sections for this purpose. The words “all moneys then due and owing by or recoverable from the said commissioners,” in s. 148, mean a liquidated and ascertained sum. The legislature never could have meant to keep alive and transfer a claim which had never been brought forward. [WILLES, J.—The beginning of s. 180 shows the policy of the act. I have a strong notion that there has been a decision upon the subject.(a)] The 180th and 181st sections clearly relate to debts which have been made a charge upon the works, and to liabilities ascertained at the time of the passing of the act. It was, of course, highly expedient that the board should know at once what claims existed against them. This liability will be cast upon an entirely different set of rate-payers. [BYLES, J.—Section 169 recognises it as a landlord’s tax.] The 182d section enacts, that, where the metropolitan commissioners of sewers have incurred any expenses authorized by the 11 & 12 Vict. c. 112 to be paid by an *im- [*502 provement rate, or as charges for default, “it shall be lawful for the metropolitan board of works to levy improvement rates or charges for default for the recovery of the whole of such expenses, or such portion thereof as shall still remain due and unpaid, in the manner directed by the said act; and the said board shall have all the rights and remedies for the recovery thereof which are now vested in the metropolitan commissioners of sewers in this behalf.” There is no clause in the act expressly transferring to the metropolitan board of works a liability of this sort. If it had been intended, it was very easy to say so.

WILLES, J.—I am of opinion that the judgment of the court in this case ought to be in favour of the claimant. The only difficulty which is suggested to lie in his way arises out of the powers of the commissioners under the 11 & 12 Vict. c. 112 having been transferred to the metropolitan board of works under the 18 & 19 Vict. c. 120. But that transfer cannot, in my opinion, affect the rights which the claimant would have had if the former act had remained in force. From the earliest time, it has been an object of interest and anxiety to the legislature that the country should be protected from floods and inundations, and for that purpose commissions were issued from time to time, beginning so early as the reign of Edward the Third, and

(a) The point was glanced at in *Sinnott v. The Board of Works for the Whitechapel District*, 3 C. B. N. S. 674 (E. C. L. R. vol. 91).

probably earlier.(a) Since that time various statutes have been passed for the maintenance and regulation of sea-walls and sewers at the expense of the parties to be benefited thereby. This was the object of the legislature in passing the 11 & 12 Vict. c. 112 and the 18 & 19 Vict. c. 120, and it was not their intention that it should be done at the expense of private individuals. The 88th section of the former

*503] *act empowers the commissioners to repair the sewers vested in them, and from time to time to construct new ones, with this qualification,—“making compensation for any damage done thereby, as hereinafter mentioned.” It has been established that the meaning of that is, not that the making compensation shall be a condition precedent to the taking or entering upon the land; but that the act may be done, and that the making of compensation is an obligation cast upon the commissioners. That compensation is dealt with by s. 69, which enacts that “full compensation shall be made out of such rates to be levied under this act as the commissioners shall by their decree direct, to all persons sustaining any damage by reason of the exercise of any of the powers of this act:” and then follow provisions for the manner of ascertaining the amount. If the amount of damage could be ascertained without the intervention of surveyors and arbitrators, the obligation on the commissioners would be as much an obligation to pay a sum in moneys numbered as if it were a bill or a note. The obligation is, by reason of their exercising the powers vested in them by the statute, to make compensation for damage done to an individual. But the commissioners are not to be personally liable: the compensation is to be paid “out of such rates to be levied under this act as the commissioners shall by their decree direct.” The circumstance of a considerable period having elapsed since the acts complained of were done, affords merely an argument *ab inconvenienti*. Delay is inconvenient to the debtor, because he may be supposed to have forgotten his liability. It is also inconvenient to the creditor, as rendering it more difficult for him to establish his claim. But, in the absence of any statutory limitation, it has no more importance

*504] *attributed to it by Mr. Mellish when he said that it was probable that the legislature should have intended that debts and demands the existence of which might be known should be kept alive, but not these unliquidated liabilities. That argument, however, is not *ad rem*. The liability might have been incurred the very day before the metropolitan board of works assumed the functions of the commissioners under the 11 & 12 Vict. c. 112: the objection, therefore, would apply only to the unliquidated character of the claim, not to its staleness. We are here dealing with a question which ought to have the same result in the year 1865 as it would have had if raised the day after the Metropolis Local Management Act, 1855, came into operation. We have now to put a construction upon the statute, and to see whether the liability lapsed when the powers of the commissioners under the 11 & 12 Vict. c. 112 came to an end, or was kept alive and transferred to the new board called into existence in the place of them by the act of 1855. I have already observed that the act of 1855 was a mere transfer for administrative convenience of

(a) See Woolrych on Sewers, 2, 3, 3d edit.

the powers of the commissioners of sewers to the metropolitan board of works. There can be no reason, therefore, why the metropolitan board of works, or the public whom they represent, should be absolved from any liability to which they were exposed at the time of the existence of the former body under the 11 & 12 Vict. c. 112. Is there anything in the language of the act, read by the light afforded by these probabilities, to show that the obligation should not continue? The first section which appears to me to be material is the 145th, by which the powers of the commissioners of sewers were put an end to. It enacts, that, "from and after the commencement of this act, all duties, powers, and authorities vested in the metropolitan commissioners of sewers shall cease to *be so vested; and in the meantime and until such commencement the metropolitan [*505 commission of sewers and the 11 & 12 Vict. c. 112, and the acts amending the same, shall continue in force." By s. 146 the metropolitan board of works is substituted for the commissioners, in the largest possible words: "No action, suit, or other proceeding whatsoever, commenced or carried on by or against the said commissioners, shall abate or be discontinued or prejudicially affected by the determination of the powers of such commissioners, but shall continue and take effect in favour of or against the metropolitan board of works in the same manner in all respects as the same would have continued and taken effect in relation to the said commissioners if this act had not been passed, and the powers of the said commissioners had continued in full force: and all decrees and orders made, and all fines, amerciaments, and penalties imposed and incurred respectively previously to the commencement of this act, shall and may be enforced, levied, recovered, and proceeded for, and all administrative proceedings commenced previously to the commencement of this act, shall and may be continued, proceeded with, and completed, the metropolitan board of works being, in reference to the matters aforesaid, in all respects substituted in the place of the said commissioners." By s. 147, all rates made by the commissioners under the former act are to be recoverable by the board under this act, and applied as they would have been by the commissioners. Then comes s. 148, which enacts that "all property, matters, and things whatsoever vested in the metropolitan commissioners of sewers, except such sewers as are thereby vested in any vestry or district board (under s. 68), &c., shall be vested in the metropolitan board of works; and all persons who then owe any *money to the said commissioners of sewers, or [*506 to any person on behalf of such commissioners, shall pay the same to the metropolitan board of works, or as they may direct: and all moneys then due and owing by or recoverable from the said commissioners shall be paid by or recoverable from the metropolitan board of works: and all contracts, agreements, bonds, covenants, and securities theretofore made or entered into with or in favour of or by the said commissioners, and all contracts, agreements, bonds, covenants, and securities made or entered into with or in favour of or by any former or other commissioners, which under the 11 & 12 Vict. c. 112 were to take effect in favour of, against, and with reference to the said metropolitan commissioners of sewers, and are now in force, shall take effect and be proceeded on and enforced, as near as circum-

stances admit, in favour of, by, against, and with reference to the metropolitan board of works, as the same would have taken effect and might have been proceeded on and enforced in favour of, by, against, and with reference to the said metropolitan commissioners of sewers if this act had not been passed, and the powers of such commissioners had continued in full force." Now, stopping at section 1480, and reading it with its kindred sections, it should seem to be clear that the legislature intended that the new board should, except as to the minor sewers already vested in the local bodies, stand in all respects in the same position as the commissioners of sewers before stood in. We then come to a section which still more clearly shows that such was the intention,—section 181. That section enacts, that, "notwithstanding the determination or expiration of the 11 & 12 Vict. c. 112, all mortgages, annuities, securities, and other debts and *liabilities* which at or immediately before such deter-

*507] mination or expiration may be a charge on or payable *out of all or any of the rates authorized to be levied thereunder, shall continue in full force and be a charge on the districts or parts in which such rates would have been authorized to be levied in case such act had continued in force:" "and the sums from time to time becoming payable under or required for payment of the said mortgages, annuities, securities, debts, and *liabilities*, shall be raised by the metropolitan board of works in such districts or parts in like manner as the expenses of such board in the execution of this act," &c. Here we have words apt to express the conclusion at which justice and good sense would incline one to arrive. We have the large word "*liabilities*," and we find it coupled with that which is, as we have already seen, strictly applicable to the obligation cast upon the board to make compensation to the owners of property which they have taken or which has been injuriously affected by their works. Two arguments have been urged on behalf of the board, to show that that should not be the construction put upon the act. One of these I have already dealt with. The other is founded on the maxim *nosci-tur à sociis*. The word "*liabilities*," it is said, is found accompanied by words which are applicable only to debts or engagements for fixed sums, and therefore is to be taken to mean *liabilities ejusdem generis*. I feel rather inclined to accept that argument, but at the same time to deny that the claim in question is a liability of a different character from any other debt which might arise from a contract entered into with the board. Suppose the metropolitan board of works had entered into a contract for an extensive work, of which the exact price,—for extras, for instance,—was not determined; could it be contended that that, being a claim for unliquidated damages, was therefore not transferred to the metropolitan board? It may well be that the board

*508] might be in doubt what *sum they should lay by as a sinking-fund to meet such a demand, under the latter part of s. 181; but I think it would be impossible to say that for that reason it was not a debt or liability transferred to them within the act. We must, therefore, reject the argument derived from the sinking-fund. I cannot help thinking that that which struck my Brother Byles's mind might be set against that argument, viz. that, when the clause is deal-

ing with claims against the former commissioners of sewers in respect of mortgages, securities, and debts, it omits the word "liabilities," and resumes it when it comes to give power to the board to raise moneys to provide for the liquidation of claims against them. There seems, therefore, to be no reason why this obligation should be excluded, and there seems to me to be abundant reason why it should be kept alive: and there is language in the act which is aptly descriptive of it, or at least large enough to include it. For these reasons, I am of opinion that Mr. Pettiward's right is not lost, and that he is entitled to claim compensation at the hands of the metropolitan board of works.

BYLES, J.—I am of the same opinion. I say nothing as to Mr. Pettiward's right to claim compensation from the old commissioners of sewers. I start with the admission that there was an unliquidated demand against them. The only question before us is, whether that liability is transferred to the metropolitan board of works under the 18 & 19 Vict. c. 120. I cannot approach the consideration of that question without being impressed with a strong sense of the justice of Mr. Pettiward's claim. A portion of his estate has been taken from him for the purpose of constructing a sewer,—or, which is the same thing, its value has been diminished. The district has got the benefit of it, and *ought to pay for it. The commissioners of sewers were clearly liable to the owner's claim for compensa- [*509 tion. The 148th section of the 18 & 19 Vict. c. 120, strips the commissioners of all property in possession or in action, and of all claims of any sort, and transfers them to their successors, the present board. Are not their liabilities transferred also? I entirely agree with my Brother Willes in the construction which he has put upon the 148th section. And I also think with him that the general words of the 181st section apply to this case. As to the argument, of Mr. Mellish that the power conferred upon the board to raise money to pay off mortgages, annuities, and debts, does not enable them to apply the moneys raised in discharge of liabilities of an unliquidated character, it seems to me that it has no foundation. This is a claim which in the ordinary course of things would be turned into an ascertained claim for moneys numbered; and then will come the time for the board to apply the machinery of the act to pay off the principal sum. For these reasons, I think our judgment should be for the claimant.

MONTAGUE SMITH, J., had gone to Chambers.

Judgment for the claimant.

*RICHARD HERRING, Appellant; THE METROPOLITAN BOARD OF WORKS, Respondents. *June 27.* [*510]

The mere temporary obstruction of access to premises, though it may cause some inconvenience and loss of business to the occupier, is not a "damage" in respect of which he is entitled to claim compensation under the 135th and 225th sections of the Metropolis Local Management Act, 18 & 19 Vict. c. 120.

THE following case was stated by one of the magistrates of the metropolitan police district, for the opinion of the court:—

1. On the 6th of March, 1865, a summons was issued on an information laid by the appellant before James Vaughan, Esq., one of the magistrates of the police courts of the metropolis, sitting at the police court, Bow Street, in the county of Middlesex, and within the metropolitan police district, For that, being the occupier of certain land and premises being No. 1, Northumberland Street, in the parish of St. Martin-in-the-Fields, in the county of Middlesex, and within the said district, as tenant from year to year, the respondents, the metropolitan board of works, in the exercise of the powers conferred upon them by the 18 & 19 Vict. c. 120, injuriously affected the said land and premises, and occasioned loss and damage to the appellant in his said business; whereupon the said appellant claimed the sum of 50*l*. as compensation in respect thereof.

2. The said information was heard by the magistrate on the 10th of March, 1865; and, having taken time to consider, he on the 24th of March, 1865, gave judgment for the respondents, the said metropolitan board of works.

3. The appellant, being dissatisfied with his determination, as being erroneous in point of law, demanded a case, under the 20 & 21 Vict. c. 43.

4. The appellant is tenant from year to year of certain premises in Northumberland Street, Strand, consisting of a small house, yard, and *511] stabling, where he *carries on the business of a livery-stable keeper. The entrance to the appellant's yard consists of a gateway (without a gate) about twelve feet wide, under that portion of the premises the frontage of which is in Northumberland Street.

5. In July, 1864, the respondents, in the exercise of the powers conferred upon them by the Metropolis Local Management Act, erected a hoarding in Northumberland Street, for the purpose of enabling them to reconstruct a sewer running under that street. The hoarding occupied the whole width of the street between the kerbstones on either side; and the upper end of it stood five or six inches higher up the street than the lower side of the appellant's gateway, that is, it overlapped the entrance to his premises five or six inches. It stood three feet six inches from the nearest part of his premises.

6. Against the upper end of the hoarding, and also on the side next the appellant's premises, bricks were stacked; and occasionally rubbish from the sewer, and sand, were deposited there. The distance the bricks and rubbish projected from the hoarding was stated by the witnesses for the respondents to be about eighteen inches, whilst those for the appellant estimated it to extend to five or six feet. Nothing whatever was placed by the respondents upon any part of the appellant's premises.

7. The access to the appellant's premises was thereby rendered less convenient than it had been before. Two or three men were sometimes required to assist in getting a carriage into the yard, in consequence of the obstruction; and the earnings of the business between August, 1864, and January, 1865, during which time the obstruction existed, were 10*s*. a week less than in the corresponding period of 1863. Several of the appellant's customers were called to speak to *512] the *inconvenience occasioned by the obstruction; one of whom had ceased to use the appellant's stables in consequence.

8. No part of the appellant's premises was taken or required to be taken; nor have they sustained any actual damage from the defendant's works.

9. On behalf of the appellant, it was contended, that, under these circumstances, he was entitled to compensation under the 126th section of the Lands Clauses Consolidation Act, incorporated in the Metropolis Local Management Act, 18 & 19 Vict. c. 120, or under the 135th and 225th sections of the last-mentioned act.

10. Upon the authority of *Ricketts v. The Metropolitan Railway Company*, 13 Weekly Reporter 455, *The Queen v. The Sheriff of Middlesex*, *Re Somers v. The Metropolitan Railway Company*, 31 Law J., Q. B. 261, the magistrate was of opinion that the appellant was not entitled to compensation under the Lands Clauses Consolidation Act. And he was further of opinion that the word "damage" in the 135th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, only applied to such damage as would produce structural injury, or impair the freehold: and he consequently dismissed the summons.

The question upon the above statement was, whether the appellant was entitled to compensation under the above statutes or either of them.

Butt, for the appellant.(a)—The magistrate on the hearing treated the appellant's claim as arising partly *under some sections of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, [*513 which are by s. 151 incorporated with the Metropolis Local Management Act, 18 & 19 Vict. c. 120. He, however, is content to rest his claim to compensation upon the 135th and 225th sections of the last-mentioned act. The 135th section vests all the main sewers of the metropolis which were formerly vested in the commissioners under the 11 & 12 Vict. c. 112, in the metropolitan board of works, and empowers them to make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis, and also to make all such other sewers and works, and such diversions or alterations of any existing sewers or works vested in them under the act, as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis, and to discontinue, close up, or destroy such sewers for the time being vested in them under the act, as they may deem unnecessary, and from time to time to repair and maintain the sewers so vested in them, or such of them as may not be discontinued, closed up, or destroyed as aforesaid, "and, for the purposes aforesaid," such board shall have full power and authority to carry any such sewers or works through,

(a) The points marked for argument on the part of the appellant were as follows:—

"1. That the magistrate was wrong in holding that structural injury to the appellant's premises was necessary in order to entitle him to compensation under the 135th section of the 18 & 19 Vict. c. 120.

"2. That the authorities cited by the magistrate, and on which he bases his decision, have no bearing on the case as stated:

"3. That the facts found entitle the appellant to compensation for damage done, within the 135th section of the 18 & 19 Vict. c. 120:

"4. That the damage sustained by the appellant is such as would have entitled him to maintain an action at law against the respondents, were they not protected by their acts and the acts incorporated therewith; and that he is therefore entitled to compensation."

across, or under any turnpike-road, or any street or place laid out as
 *514] or intended *for a street, as well beyond as within the limits of
 the metropolis, or through or under any cellar or vault *under
 the carriage-way or pavement of any street*, and into, through, or under
any lands whatsoever or beyond the said limits, *making compensation
 for any damage done thereby as hereinafter provided.*" That refers to the
 225th section, upon which the summons in this case was founded.
 The 225th section enacts, that, "in every case where the amount of
 any damage, costs, or expenses is by this act directed to be ascertained
 and recovered in a summary manner, or the amount of any damage,
 costs, or expenses is by this act directed to be paid, and the method
 of ascertaining the amount or enforcing the payment thereof is not
 provided for, such amount shall, in case of dispute, be ascertained and
 determined by and shall be recovered before two justices; and the
 amount of any compensation to be made under this act by the said
 metropolitan board, or any vestry or district board, shall, unless
 herein otherwise provided, be settled, in case of dispute, by and shall
 be recovered before two justices, unless the amount of compensation
 exceed 50*l.*, in which case the amount thereof shall be settled by arbi-
 tration, according to the provisions contained in the Lands Clauses
 Consolidation Act, 1845, which are applicable where questions of dis-
 puted compensation are authorized or required to be settled by arbi-
 tration." The claim here does not exceed 50*l.* The contention on
 the part of the board will be, that the damage spoken of in s. 135 is
 the same sort of damage as that contemplated in the 68th section of
 the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, viz.,
 "structural damage," as it is called, that is, where the land or pre-
 mises are actually interfered with or taken by the board: and that
 was the view taken by the magistrate. But the words of the 135th
 *515] section of the *Metropolis Local Management Act are very
 large and comprehensive, and evidently intended that compen-
 sation should be awarded wherever damage is sustained. [WILLES,
 J.—What do you understand to have been decided by the Exchequer
 Chamber in *Ricketts v. The Metropolitan Railway Company*? I can-
 not discover whether the court decided that no action could be brought
 by *Ricketts*, or that, assuming an action would lie, the case was not
 within the 68th section of the Lands Clauses Consolidation Act.] I
 presume they meant to decide that no action would lie at the suit of
Ricketts at all. The facts of that case, as stated in the judgment de-
 livered by Erle, C. J., were these:—The plaintiff was lessee of a public-
 house, situate in Crawford Passage, Clerkenwell. Along Crawford
 Passage, across Coppice Row, was a public footway. The defendants,
 for the purpose of their works, placed a hoarding in Coppice Row,
 and placed steps to enable the foot-passengers to pass up on one side
 and down the other side of a bridge over the hoarding, and did all
 this in accordance with their duty under their statutes, and after
 twenty months restored the premises to their original state. After
 this bridge had been so erected, the number of passengers passing to
 and fro along Crawford Passage diminished. The refreshment sold
 by the plaintiff was diminished in proportion; and the jury must be
 taken to have found that the bridge and steps formed the motive
 which turned the passengers to another direction, and prevented the

sale of refreshments which would otherwise have been bought by them, and so caused the loss of profit. These," says his Lordship, "being the facts, the question is raised, whether the plaintiff is shown to be entitled to compensation in respect of land or any interest therein which has been injuriously affected by the execution of the defendants' *works." After stating the contention on the one side and on the other, his Lordship proceeds,—“As to the first [*516 point, viz., that, upon these facts, if there had been no statute for the defendants, the plaintiff would have had no cause of action against them for special damage caused by the obstruction of a highway, we assume it to be clear that there is no title to compensation under the statutes for an obstruction of a highway, unless without the statutes an action would have lain for the obstruction and the special damage, according to *Re Penny and The South Eastern Railway Company*, 7 Ellis & B. 660 (E. C. L. R. vol. 90). We assume further, that, although the action would lie, it does not follow that there would be title to compensation, because the action would lie for a special damage to a personal interest, but no compensation is given under the statute unless *land* has been injuriously affected: see Lord Cranworth's judgment in *Ogilvie v. The Caledonian Railway Company*, 2 Macq. 229. Then, first, do these facts show that an action would have lain? The action lies where the exercise of the right of way by or on behalf of the plaintiff has been obstructed, and a greater damage has been caused to him thereby than is caused to the Queen's subjects in general by obstructing them in the exercise of their right. This position is not disputed; but the following cases exemplify its application. In *Iveson v. Moore*, 1 Ld. Raym. 486, the plaintiff was prevented by the defendant's obstruction of the highway from using the way for carting coals from his colliery, which coals were deteriorated by the delay: in this case the law on actions for obstructions of highways is well discussed. In *Maynell v. Saltmarsh*, 1 Keble 847, the plaintiff was prevented by the defendant's obstruction from carrying his corn, and so the corn became damaged by train. In *Hart v. Basset*, 2 T. Jones 156, the plaintiff, a farmer of tithes, *was prevented by the defendant's obstruction from carrying [*517 them home; and several grounds of special damage are suggested by Lord Holt in *Iveson v. Moore*, 1 Ld. Raym. 493. In *Fineaux v. Hovenden*, Cro. Eliz. 664, the special damage mentioned as an example is damage caused directly by the obstruction of the plaintiff in the use of the way. In *Greasly v. Codling*, 2 Bingh. 263 (E. C. L. R. vol. 9), 9 J. B. Moore 489 (E. C. L. R. vol. 17), the plaintiff was prevented by the defendant's obstruction from carrying his coals. In *Paine v. Partrich*, Carth. 191, the plaintiff's damage was not actionable, and the example of actionable damage is put thus:—‘A particular damage, to maintain the action, ought to be direct, and not consequential, as, for instance, the loss of his horse, or by some corporal hurt in falling into a trench on a highway.’ In *Chichester v. Lethbridge*, Willes 71, the obstruction was held actionable because the plaintiff was personally opposed by the defendant in an attempt to abate the obstruction and use the way. In *Rose v. Miles*, 4 M. & Selw. 101, the plaintiff was obstructed in his use of the navigable water, and was damaged by being obliged to unload his barge and

carry the goods overland. In all these cases the plaintiff was exercising his right of way, and the defendant obstructed that exercise, and caused particular damage thereby directly and immediately to the plaintiff. Here, there has been no obstruction to the exercise of the right of way by or on behalf of the plaintiff: neither he himself nor any one standing in a legal relation to him, such as servant, agent, tenant, or any other legal relation which gave to the plaintiff a legal interest in his use of the way, has been obstructed. But some unknown travellers, having a free option to pass from north to south either by Crawford Passage or any other pass, have chosen some other pass, because they did not like the steps at Coppice Row. The *518] *plaintiff has no cause of action against the defendants by reason of any obstruction direct to himself: the travellers who have chosen to turn out of their path to avoid the steps, have no cause of action against the defendants in respect of the obstruction; and it seems unreasonable that an obstruction which created no cause of action either for the plaintiff or the travellers separately, should by indirect consequence become a cause of action to the plaintiff, because the travellers exercised their choice as to their path and as to their refreshment,—a choice in which the plaintiff had no manner of legal right.” After referring to *Wilkes v. The Hungerford Market Company*, 2 N. C. 281, 2 Scott 446, his Lordship continues,—“ If the same question was raised in an action now, we think it probable that the action would fail, both from the effect of the cases that preceded *Wilkes’s Case*, and also from the reasoning in the judgment in *Ogilvie v. The Caledonian Railway Company*, 2 Macq. 229. There, a railway crossed a highway on a level, and the highway was stopped by two gates, for trains to pass, and the plaintiff lived near these gates, and suffered frequent inconvenience; but the judgment is, that he could maintain no action for this inconvenience; it is the delay common to all who are exercising their right at that time; and although, from his proximity, the inconvenience to the plaintiff is frequently repeated, yet it is always the same in kind, and so not actionable as special damage; and, because an action would not have lain, therefore the plaintiff had no right to compensation from the railway; and Lord Cranworth adds the limitation above suggested, that, even if the action lay, still that compensation would not be due, unless the injury was to the land. These are our reasons, for that an action would not have lain, and so the claim for compensation fails. But, secondly, even if *519] the action would *lie for this obstruction, whereby the plaintiff was damaged in his trade, still such damage did not accrue to the plaintiff in his capacity of owner of an estate in land; and the title to compensation to which the statute relates is only in respect of land or an interest therein which has been injuriously affected.(a) Here, the plaintiff has a term in the house; and the point is, whether the house is shown to be injuriously affected, because the profits of the plaintiff’s trade carried on therein are diminished by reason of the obstruction. The trading carried on in the house is entirely distinct from the estate in the house; the procuring of refreshment, and the sale thereof, and the profit thereon, may either continue or cease, without affecting the plaintiff’s interest in the house. If his license was taken away, the business would cease, but the house and the

(a) See *Bird v. The Great Eastern Counties Railway Company*, ante, p. 268.

estate therein would be the same as before; and it is clear that an estate in the house is not essential to the sale of refreshment, as many kinds are sold in the street by persons having no interest in the land where they sell. The statute limited the liability to compensation in respect of injuries to definite rights of a permanent nature,—that is, to rights in land.” None of the reasoning there has any application to this case. The obstruction complained of there was, to all Her Majesty’s subjects, and therefore no action would lie. Here, the obstruction complained of is, to the appellant’s private right of access to his own premises. If the board had thought fit entirely to bar his passage to and from his premises, could it be said that there was no right of action and no damage to be compensated for under the act? If so, why is he not to have compensation for the partial obstruction, which is proved materially to have diminished his trade?

**Raymond* (with whom was *Mellish*, Q. C.), for the respondents.(a)—This is not like the case of a trading company established for the purpose of profit. The board are intrusted with large powers, which are to be exercised by them for the general benefit of the public. The legislature has thought fit to provide that they shall make compensation “for any damage done thereby.” The question is, what is the meaning of those words? It is submitted that they mean damage to the premises themselves,—structural damage; not a mere temporary inconvenience sustained by one in common with all the other inhabitants of a street or district, through the exercise by the board of their duties in the construction or repair of a sewer or other work authorized by the statute. [WILLES, J.—This is a thing which hardly required statutory powers at all. The old commissioners were at liberty to reconstruct an old sewer without making any compensation to any one, without the aid of this statute. If they or their contractors did the work negligently, so that damage accrued to an individual, an action would have lain: *The Grocers’ Company v. Donne*, 3 N. C. 34, 3 Scott *356. But, for merely doing the work, [*521 nobody was entitled to compensation.] It never could have [*521 been intended that such an inconvenience as this should be the subject of compensation: and, unless an intention to that effect is clearly expressed, this claim cannot be entertained. The case of *Ogilvie v. The Caledonian Railway Company*, 2 Macq. 229, is a distinct authority upon the subject, and cannot be distinguished in principle from this case. The language of the clause giving a right to compensation under the Lands Clauses Consolidation Act, is even more flexible than that upon which this question arises. The decision of the Exchequer Chamber in *Ricketts v. The Metropolitan Railway Company* proceeded evidently on the ground, that, assuming an action

(a) The points marked for argument on the part of the respondents were as follows:—

“1. That the appellant’s premises not having been injuriously affected, and not having sustained any direct or immediate damage, the appellant is not entitled to compensation:

“2. That the only damage the appellant has sustained has been the deprivation of the use of the public highway, viz., Northumberland Street, for a short time, which is a damage sustained by him in common with the general public having occasion to use that street during the same period, and is not a damage entitling the appellant to compensation:

“3. That the damage, if any, sustained by the appellant, is a loss of trade-profit merely, and is not the subject of compensation: See *Ricketts v. the Metropolitan Railway Company*, Exch. Ch., 13 W. Rep. 455.”

would lie for that which was there complained of, it was not such a damage as compensation could be given for upon the principle laid down by the House of Lords in *Ogilvie v. The Caledonian Railway Company*. "Damage done thereby," means damage occasioned by going through or touching the premises,—an actual injury to them, not a remote contingency such as is here suggested.

Thesiger (by the permission of the court), in reply.—The plaintiff in *Ogilvie v. The Caledonian Railway Company* was held not to be entitled to compensation, because the damage to the plaintiff and to the general public was the same in kind, though different in degree. Here, the damage sustained by the appellant is a damage of a totally different kind from that sustained by the rest of the inhabitants of Northumberland Street. He cannot use his premises for the purpose of his trade without incurring much additional trouble and expense. In *Moore v. The Great Southern and Western Railway Company*, 10 Irish Common Law Rep. 46, the plaintiff occupied a cottage and a *522] small *piece of land on a level with and abutting on a public highroad, from which a short way or passage over the plaintiff's land afforded access to his cottage. A railway company, in the execution of the works of their railway, lowered the public highroad seven feet, leaving the plaintiff's land and cottage on the edge of a precipice of that height, and thereby obliging the plaintiff to make use of a step-ladder in order to obtain access from the public highroad to the way or passage leading over his land to his cottage. An action having been brought by the plaintiff against the railway company under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 53, 55,—it was held by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that the injury complained of being a permanent injury to the plaintiff's land, it was the subject of compensation by an arbitrator, pursuant to s. 6, and the 14 & 15 Vict. c. 70. The like was held in *Toshey v. The Great Southern and Western Railway Company*, 10 Irish Law Rep. 98, where the thing complained of was, raising the public highroad to the height of ten feet opposite to the plaintiff's house. In *Glover v. The North Staffordshire Railway Company*, 16 Q. B. 912 (E. C. L. R. vol. 71), the plaintiff was the owner of land, appertaining to which was a right of way over a road. A railway company, under the provisions of their act, constructed a railway crossing the road, on a level, and erected gates on the road at each side of the railway, which were kept locked, under the provisions of the act, a servant of the company (who resided between one and two hundred yards from the gate) keeping a key, and the plaintiff also having a key. From the nature of the ground, a person crossing the railway by the road would not see a train coming in one direction until it was at a distance ordinarily passed in seven- *523] teen seconds. The plaintiff claimed from the company *more than 50*l.*, on the ground that his land was injuriously affected, and required them to issue a warrant for summoning a jury. The company not having paid or issued their warrant, the plaintiff brought debt for the amount claimed; and issue was joined on a traverse of the allegation that the land was injuriously affected. The jury found the above facts specially, and also that the land was depreciated in value: and it was held that the land was injuriously affected, within

the meaning of the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845.

WILLES, J.—It appears to me that the decision of the magistrate in this case was right. Without going the whole length of Mr. Raymond's argument, that there can be no case of compensation for damage under the Metropolis Local Management Act, unless there be some structural injury to private property, I am clearly of opinion, that, where the metropolitan board are engaged in the performance of a public work which renders it necessary to erect a hoarding or to deposit materials or rubbish in a public street, the mere fact that thereby the passage along the street becomes more difficult and inconvenient to A. than to B. and C., gives A. no claim to compensation under the act. The metropolitan board of works having all the main sewers of the metropolis vested in them, with large powers to alter and repair them, would *prima facie* be entitled, as the commissioners were under the former acts, to reconstruct such sewers and to do all things for the proper and efficient performance of the duties intrusted to them, without rendering themselves liable to any action. Neither will any action lie against the contractors who do the work under them, unless they are guilty of some negligence: see *The Grocers' Company v. Donne*, 3 N. C. 34, 3 Scott 356. In other *words, [*524 it appears to me that, the construction of the hoarding being necessary for the due performance of the works by the board, and the obstruction not having been more than was necessary, or kept for an unreasonable time, would give the appellant no cause of action, and consequently no claim for compensation under the act. Upon that short ground, I am of opinion that the decision of the magistrate was right, because *damnum* must mean *cum* not *sine injuriâ*. It would clearly be *sine injuriâ* to erect a hoarding to an extent and for a period not unreasonable. As Mr. Raymond well observed, these temporary inconveniences must from time to time occur everywhere: and, if an action would lie against the metropolitan board of works each time a sewer is opened for repair, the burthen would be intolerable. Individuals must be content to bear these small inconveniences, in consideration of the general benefit to the public. I express no opinion as to whether or not damage in the 135th section of the 18 & 19 Vict. c. 120, is confined to what is called structural damage, though I very much incline to think it is. It certainly is a very nice question. The decision must, upon the whole, be confirmed; but I do not think it is a case for costs.

BYLES, J.—I entirely agree with what has fallen from my Brother Willes. Though one of the judges who dissented from the conclusion arrived at by the Exchequer Chamber in *Ricketts v. The Metropolitan Railway Company*, I should be one of the first to bow to the authority of that decision. The case, however, has no bearing upon the matter now in hand. I agree with my Brother Willes that it is not necessary for us to say what the legislature meant by "damage." My judgment rests upon this ground, that the injury here *com- [*525 plained of, viz. the temporary obstruction of the public way, rendering the access to the appellant's premises more inconvenient for a short time, gave him no cause of action and no right to claim compensation. As a general rule, all the Queen's subjects have a right

to the free and uninterrupted use of a public way: but, nevertheless, all persons have an equally undoubted right for a proper purpose to impede and obstruct the convenient access of the public through and along the same. Instances of this interruption arise at every moment of the day. Carts and wagons stop at the doors of shops and warehouses for the purpose of loading and unloading goods. Coal-shoots are opened on the public footways for the purpose of letting in necessary supplies of fuel. So, for the purpose of building, rebuilding, or repairing houses abutting on the public way in populous places, hoardings are frequently erected enclosing a part of the way. Houses must be built and repaired; and hoarding is necessary in such cases to shield persons passing from danger from falling substances. If this be the right of private persons, à fortiori must it be the right of a public body to which extensive power is intrusted for the general good of all. On the ground, therefore, that the obstruction here was of a temporary character, and was done for a proper purpose, and not continued for an unreasonable time, I am of opinion that this is not a case for compensation under the Metropolis Local Management Act.

MONTAGUE SMITH, J.—I am of the same opinion. The legislature were dealing with a public body engaged in a public work for the public good, and therefore were not likely to have intended to fetter them in such a manner as to obstruct their general usefulness. *526] Although the words of the 135th section are large, I do not think they extend to a case of consequential damage like this. The damage is said to have arisen by reason of the erection of the hoarding necessary for repairing the sewer in a public street rendering the access to the appellant's premises inconvenient, whereby, it is said, he has sustained a loss not common to the rest of the public or the rest of the inhabitants of the particular street. The house itself is not injured: the appellant's premises are untouched: the only damage complained of is a consequence, and a remote consequence, of the erection on a public thoroughfare of a hoarding for the performance by the board of an authorized work. If a claim for compensation for such damage can be sustained, I see no reason why a claim might not equally be sustained for the loss of lodgers by reason of noises or stench arising from the opening of the sewer. The word "damage" must necessarily receive a more limited construction. It must be confined to something like actual damage to property. That view seems to me to be strongly supported by the collocation of the words in the clause. The words having reference to compensation for damage follow words which authorize the board to make such sewers and works, and such diversions or alterations of any existing sewers or works vested in them under the act, as they might from time to time think necessary, and to repair and maintain the sewers so vested in them: "and for the purposes aforesaid such board shall have full power and authority to carry any such sewers or works through, across, or under any turnpike-road, or any street or place laid out as or intended for a street, as well beyond as within the limits of the metropolis, or *through or under any cellar or vault under the carriage-way or pavement of any street, and into, through, or under any lands whatsoever* within or beyond the said limits, making compensation

*for any damage done thereby." As I read the section, "dam-
age done thereby" means, by passing through or under any [*527
cellar or vault, or through or under any lands whatsoever. The
great inconvenience which would result from the numerous claims of
this sort which must be constantly arising, affords a strong argument
against the probability of the legislature having intended this to be a
subject of compensation. And, reading the whole clause together, I
am clearly of opinion that the case is not within the words, and con-
sequently that the magistrate's decision was right.

Decision affirmed, without costs.

WARD Public Officer of THE LEEDS BANKING COMPANY,
v. GREENLAND. June 26.

The declaration in an action against the manager of a banking company, after alleging the
retainer and employment of the defendant and the nature of his duties as manager, stated,
amongst other things, that he "did not nor would take due and proper care not to advance the
money of the company to persons of doubtful, insufficient, or bad means or credit, or on
doubtful, insufficient, or bad securities, or to discount bad or forged bills and notes; and
negligently and improperly advanced the money of the company to persons of doubtful, insuffi-
cient, and bad means and credit, and on doubtful, insufficient, and bad securities, and dis-
counted and renewed bad and forged bills and notes, and wholly neglected to take due and pro-
per care or to use or employ due and proper skill and diligence in and about the management
of the affairs of the bank and the discharge of the duties of manager as aforesaid."

Plea to so much of the breach as above set out, that the deed of settlement of the company
contained a clause, which provided, amongst other things, that "none of the directors, trustees,
or other officers should be answerable or accountable for the insufficiency or deficiency of any
security or fund in or upon which the moneys of the company might be placed out or invested,
or for any loss, damage, or misfortune which might happen to the moneys, funds, effects, or
property of the company, unless the same should happen in consequence of the wilful neglect
or default respectively of such director, trustee, or other officer of the company;" that the
defendant was the manager and an officer of the said company within the meaning of the said
deed of settlement, and was employed as such upon the terms of the said last-mentioned clause;
and that the said alleged breaches to which the plea was pleaded did not happen by reason or in
consequence of the wilful neglect or default of the defendant as such manager as aforesaid:—

Held, that the plea was a good answer as to so much of the breach to which it was pleaded.

THE first count of the declaration stated, that, before and at the
time thereafter mentioned, the said Leeds Banking Company was a
company formed under the *provisions of the 7 G. 4, c. 46, and [*528
duly incorporated by deed of settlement bearing date the 19th
of November, 1832; that thereupon the defendant, at his request, and
for reward to him in that behalf, was retained and employed as the
manager of the said company to manage the affairs of the said bank,
and the defendant accepted and entered upon such retainer and em-
ployment, and promised to perform the duties of such manager; and
thereupon it became and was the duty of the defendant as such man-
ager to cause to be entered in the books of the company proper and
correct entries and accounts of all receipts and payments and transac-
tions of the company, and of all profits and losses arising therefrom,
and of all dealings with and investments of the capital of the said
company, and all moneys deposited with the said company; and to
prepare for the inspection of the directors of the said company from
time to time true and correct summaries or balance-sheets of the affairs
of the company; and from time to time to cause the books of the

company to be properly settled, adjusted, and balanced, and to prepare full, true, and explicit statements and balance-sheets of the affairs of the company, exhibiting the debts and credits, and the capital and property, and the profits and losses of the company, and containing all matters and things requisite for fully, truly, and explicitly manifesting the state and affairs of the company; and to give to the directors of the said company all other information in his power necessary and proper to enable them to make out such full, true, and explicit statements and balance-sheets of the affairs of the company as aforesaid; and from time to time to give information to the directors of all bad debts which had accrued to the said company, so as to enable the directors to distinguish between the same and the good debts and *529] assets of the company; and to *take due and proper care not to advance the money of the said company to persons of doubtful, insufficient, or bad means or credit, or on doubtful, insufficient, or bad securities, or to discount or renew bad or forged bills of exchange or promissory notes; and to take due and proper care and use and employ due and proper skill and diligence in and about the management of the affairs of the said bank and the discharge of the duties of manager as aforesaid: Breach, that the defendant, not regarding his duty and promise in that behalf, did not nor would cause to be entered in the books of the said company proper and correct accounts of all receipts, payments, and transactions of the said company, and of all profits and losses arising therefrom, and of all dealings with and investments of the capital of the said company, and all moneys deposited with the said company; and did not nor would prepare for the inspection of the directors of the said company from time to time true and correct summaries or balance-sheets of the affairs of the said company; and did not nor would from time to time cause the books of the said company to be properly settled, adjusted, and balanced; and did not nor would from time to time prepare full, true, and explicit statements and balance-sheets of the affairs of the said company, exhibiting the debts and credits, and the capital and property, and the profits and losses of the company, and containing all matters and things requisite for fully, truly, and explicitly manifesting the state and affairs of the company; and did not nor would give to the directors of the company all the information in his power for the purpose of enabling them to make out such full, true, and explicit statements and balance-sheets of the affairs of the said company as aforesaid; and did not nor would from time to time give information to the directors of all bad debts which had *530] accrued to the said company, so as to enable the directors to distinguish between the same and the good debts and assets of the company; and did not nor would take due and proper care not to advance the money of the said company to persons of doubtful, insufficient, or bad means or credit, or on doubtful, insufficient, or bad securities, or to discount bad or forged bills of exchange and promissory notes: and the defendant, not regarding his said duty and promise, caused to be entered in the books of the company improper and incorrect entries and accounts of the receipts, payments, and transactions of the company, of the profits and losses arising therefrom, and of the dealings with and investments of the capital of the said company, and of the moneys deposited

with the said company; and prepared for the inspection of the directors of the said company from time to time false and incorrect summaries and balance-sheets of the affairs of the said company; and caused the books of the company to be settled, adjusted, and balanced in an improper and incorrect manner, and prepared statements and balance-sheets of the affairs of the company which were not full, true, or explicit statements and balance-sheets, and did not truly or fully exhibit the debts and credits and the capital and property of, and the profits and losses of the said company, and which did not contain all matters and things requisite for fully, truly, and explicitly manifesting the state and affairs of the company; and the defendant neglected and refused to give to the directors of the said company, and concealed from them, information in his power necessary and proper to enable them to make out such full, true, and explicit statements and balance-sheets of the affairs of the company as aforesaid; and gave to the directors insufficient and incorrect information of divers bad debts which accrued to the said company, and *negligently represented the same to be good debts; and negligently and improperly advanced the money of the said company to persons of doubtful, insufficient, and bad means and credit, and on doubtful, insufficient, and bad securities; and discounted and renewed bad and forged bills of exchange and promissory notes, and wholly neglected to take due and proper care or to use or employ due and proper skill and diligence in and about the management of the affairs of the said bank and the discharge of the duties of manager as aforesaid: and the said company, by reason of the premises, sustained great losses, and were deprived of large sums of money which but for the misfeasance of the defendant they would have gained; and the directors of the said company were induced to pay and give to the defendant divers large sums of money which they would otherwise not have paid or given to him.

The second count stated that the defendant, being manager of the Leeds Banking Company as in the first count mentioned, and in order to deceive the directors of the said bank as to the true state and condition of the said bank, and to induce them to increase his salary and emoluments as such manager, did falsely and fraudulently prepare and make, and cause to be prepared and made, certain false and fraudulent accounts, balance-sheets, reports, and statements, and did fraudulently conceal from the directors of the company the true state and condition of the affairs of the said company and the prospects thereof, whereby it was made to appear to the said directors as aforesaid that the said company and the affairs and prospects thereof were in a thriving and flourishing condition, whereas in truth and in fact, as he the defendant well knew, the said company and the affairs and prospects thereof then were in a bad and unsatisfactory condition; and the said directors, believing and relying on the said *accounts, balance-sheets, reports, and statements being bonâ fide and genuine, and in ignorance of the said fraudulent concealment as aforesaid, were induced to increase the salary and emoluments of the defendant, and to advance to the defendant divers large sums of money by way of remuneration for his supposed services to the said company: whereby and by reason of the premises the said company sustained great losses, and were prevented from gaining large sums of

money which they would otherwise have gained, and lost the said salary and emoluments of the defendant, and the money so from time to time advanced as aforesaid.

There was also a count for money had and received and for money due upon accounts stated.

Sixth plea, to the first count, so far as it charged that the defendant did not nor would take due and proper care not to advance the money of the said company to persons of doubtful, insufficient, or bad means or credit, or on doubtful, insufficient, or bad securities, or to discount bad or forged bills of exchange and promissory notes, and so far as it charged that the defendant negligently and improperly advanced the money of the company to such persons and on such securities, and discounted and renewed such bad and forged bills and notes, and neglected to take due and proper care or to use due and employ due or proper skill or diligence in and about the management of the affairs of the said bank and the discharge of his duties of manager in respect of the matters to which the plea is pleaded,—that, in the said deed of settlement or copartnership in the said first count mentioned, there is contained a clause in the words and figures following, that is to say, “That the directors, trustees, managers, registered public and other officers, and proprietors of the company for the time being, shall from *583] time to time and *at all times be saved harmless and kept indemnified by the company from and against, and it shall be lawful and the duty of the directors for the time being, by and out of the funds and assets of the company under their control, to replace and pay all costs, charges, losses, damages, and expenses which they or any of them shall or may sustain or be put unto in or about the execution and discharge of their respective trusts and offices, or in or about any action, suit, or proceeding, either at law or in equity or otherwise in which such directors, trustees, managers, officers, and other persons, or any of them, shall or may whilst acting in pursuance of these presents be the plaintiffs or defendants, plaintiff or defendant, or be otherwise concerned, or by reason whereof they or any of them may sustain or incur any loss or injury, *unless the same shall be sustained or incurred by reason of the wilful neglect or default of the parties sustaining or incurring the same respectively*; and the amount of such costs, charges, losses, damages, and expenses for which an indemnity is intended to be provided by this present clause, shall immediately after the same shall be so sustained or incurred, and although the same shall not be then ascertained, attach as a lien and charge upon the capital and property of the company, and as such shall, as between the parties to this or any subsequent deed or deeds of settlement, have priority over all other claims and demands whatsoever; and such lien or charge shall in the first place be satisfied and paid as far as may be out of the said fund called the reserved surplus fund: and none of the said directors, trustees, or other officers shall be answerable or accountable for the others or other of them, nor for the receipts, acts, deeds, or defaults (if any) of the others or other of them, but each of them with and for his own *wilful acts, deeds, *584]* and defaults (if any) only, or for any person *or persons with whom any money or effects of the company shall be deposited for safe custody or otherwise, or for the insufficiency or deficiency of

any security or fund in or upon which the moneys of the company may be placed out or invested, or for any loss, damage, or misfortune which may happen to the moneys, funds, effects, or property of the company, *unless the same shall happen in consequence of the wilful neglect or default respectively of such director, trustees, or other officer of the company.*" That he the defendant was the manager and an officer of the said Leeds Banking Company within the meaning of the said deed of settlement, and was employed as such upon the terms of the said last-mentioned clause: And that the said alleged breaches to which the plea is pleaded did not happen by reason or in consequence of the *wilful neglect or default* of the defendant as such manager as aforesaid.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being "that the indemnity clause set out in the said plea does not protect the defendant from liability for the general negligence and misconduct as manager as to which it is pleaded." Joinder.

Hannen (with whom was *Mellish*, Q. C.), in support of the demurrer.(a)—The first part of the 67th clause has no bearing on this matter: it contemplates a trustee *or manager being made party [*535 to proceedings. But the words relied on are at the end,— "None of the said directors, trustees, or other officers shall be answerable or accountable for the others or other of them, nor for the receipts, acts, deeds, or defaults (if any) of the others or other of them, but each of them with and for his own *wilful* acts, deeds, and defaults (if any) only, or for any person or persons with whom any money or effects of the company shall be deposited for safe custody or otherwise, or for the insufficiency or deficiency of any security or fund in or upon which the moneys of the company may be placed out or invested, or for any loss, damage, or misfortune which may happen to the moneys, funds, effects, or property of the company, *unless the same shall happen in consequence of the wilful neglect or default respectively of such directors, trustees, or other officer of the company.*" This, it is submitted, is not applicable to a case like this. The charge in the declaration is, that the defendant has been guilty of negligence in the performance of his duties as manager (specifying the particular acts of negligence relied on), whereby loss has been occasioned to the bank. It is not sought to make him responsible for any insufficiency or deficiency of any security or fund, nor for any misfortune happening to the funds or property of the company; but for a negligence independent of and anterior to the discovery of the insufficiency or deficiency of the securities. The measure of damages in the two cases would be entirely different. If he were charged with negligently receiving a bill of exchange insufficient or forged, the measure of

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the indemnity clause relied on in the sixth plea is not a protection against the negligence and misconduct of the defendant as to which it is pleaded:

"2. That the first part of the said indemnity clause is altogether inapplicable to the present case:

"3. That the latter part of the said indemnity clause is not applicable, because it is not sought to make the defendant answerable or accountable as therein mentioned, but for his general negligence and want of care and skill in the matters to which the said plea is pleaded:

"4. That there is no such legal distinction between neglect and *wilful* neglect as the plea seeks to set up."

*536] damages would be the *amount of the insufficiency. But here he is charged with general negligence in the management of the affairs of the bank, and the measure of damages would be, the extent to which the bank had been injured by that negligence. A continual disregard of the character and credit of the people he was dealing with would necessarily lead to a loss of reputation in the bank, and to pecuniary loss from inability to get their securities rediscounted by other banks. [WILLES, J.—What sort of case do you say this was intended to meet?] It was intended to relieve the company's officers from responsibility where they have, without wilful default or misconduct, advanced money on securities which turn out inadequate or bad. [MONTAGUE SMITH, J.—What do you say would be the measure of damages here?] The extent to which the character and credit of the bank had been damaged, apart from the loss on the securities. Such damages would be the direct consequence of the defendant's misconduct. [MONTAGUE SMITH, J.—In order to prove negligence, you must go into specific instances.] No doubt. [WILLES, J.—The declaration, you say, charges wilful neglect or default. Forgetting that a person to whom he made an advance, or for whom he discounted a bill, had been bankrupt, might be inadvertence. Wilful neglect would be going out shooting or fishing, instead of going to business. The plea denies that there has been any wilful neglect or default. MONTAGUE SMITH, J.—Can you suggest any negligence that the plea does not cover?] Wilful neglect is something like gross negligence—negligence with an opprobrious epithet prefixed to it. The charge intended to be levelled against the defendant here, is, general neglect and misconduct in the management of the affairs intrusted to him. [BYLES, J.—The word "wilful" is used twice in this clause. In the first instance, it applies to defaults of other persons; in the *second, to the individual's own acts.] *537] The defendant would be indemnified from all loss, except a loss arising from his wilful negligence: but that does not free him from liability for the breach of his general duty to the bank.

Quain, contra.(a)—Looking at the clause as a whole, its meaning is obvious. From the beginning to the end of it, it is framed on the idea that the officers of the company are only to be liable for the consequences of their own wilful acts and defaults. The first part of the clause explains the latter part. The matter here complained of falls more particularly within the words which free the officers of the company from responsibility "for the insufficiency or deficiency of any security or fund in or upon which the moneys of the company may be placed out or invested, or for any loss, damage, or misfortune which may happen to the moneys, funds, effects, or property of the company," unless through wilful neglect or default. The charge in substance is, laying out the funds of the company on insufficient securities. [BYLES, J.—According to your argument, it would have been enough to say,—“You shall not be responsible for ordinary negligence, but you shall for wilful negligence.”] The rest is no

(a) The point marked for argument on the part of the defendant was as follows:—

“That the clause in the deed of settlement expressly refers to such negligence as that charged in the declaration, and, makes the defendant liable only for wilful neglect or default.”

doubt superfluous. [BYLES, J.—It is very serious to say that the defendant has not been guilty of anything short of *wilful* negligence.]

Hannen, in reply.—It never could be intended that the officers of the company should be freed from the *consequences of all [*538 negligence except that which was premeditated.

WILLES, J.—It may very well be that the court may be pronouncing judgment in this case upon speculative facts: and it may well be doubted whether the clause in question was not intended to provide for the case of persons who were not partners in the bank. We must, however, give credit to the plea “that the defendant was the manager and an officer of the said Leeds Banking Company within the meaning of the said deed of settlement, and was employed as such upon the terms of the said last-mentioned clause; and that the said alleged breaches to which the plea is pleaded did not happen by reason or in consequence of the wilful neglect or default of the defendant as such manager.” Taking that clause to express the terms upon which the defendant was engaged as manager, I find that the company undertake to indemnify him against liability for the insufficiency or deficiency of any security or fund in or upon which the moneys of the company might be placed out or invested, or for any loss, damage, or misfortune which might happen to the moneys, funds, effects, or property of the company, unless the same should happen in consequence of his wilful neglect or default; and, taking the averment in the declaration, that the defendant did not take due and proper care not to advance the money of the company to persons of doubtful, insufficient, or bad means or credit, or on doubtful, insufficient, or bad securities, or to discount bad or forged bills of exchange and promissory notes, but, that he negligently and improperly advanced the money of the company to persons of doubtful, insufficient, and bad means and credit, and on doubtful, insufficient, and bad securities, and discounted and renewed bad and forged bills of *exchange [*539 and promissory notes, and wholly neglected to take due and proper care or to use or employ due and proper skill and diligence in and about the management of the affairs of the bank and the discharge of the duties of manager,—it follows that on the record it appears that the defendant has been guilty of no wilful neglect, and that he entered into the service of the company upon the terms that he was to be indemnified against the consequences of all losses which did not result from his own wilful neglect or default. That necessarily includes claims on the part of the company. Wilful neglect or default being negatived by the plea, it follows that upon this part of the record the defendant is entitled to judgment.

BYLES, J.—I have nothing to add to what has fallen from my Brother Willes.

MONTAGUE SMITH, J.—I also think the defendant is entitled to judgment on this demurrer. As I read the sixth plea, it is confined to that part of the declaration which charges the defendant as manager with negligently advancing the money of the company to persons of doubtful, insufficient, or bad means or credit, and on doubtful, insufficient, or bad securities, and discounting and renewing bad and forged bills. It must be assumed upon this record that what the defendant did was done without any *wilful* neglect or default. It may have

been done negligently, that is, without due and proper care. It seems to me that the clause of the deed of settlement which is set out in the plea, and which is averred to have been incorporated in the terms of the defendant's engagement as manager, was intended to protect the officers of the company against liability for losses accruing otherwise than through their wilful neglect and default. Mr. Hannen felt the *540] *full force of the difficulty. He admitted that the manager would not be liable for the losses sustained upon the specific securities, but insisted that he would be liable for negligence in taking them. But then arises the other difficulty; what would be the measure of damages? Upon the whole, it seems to me that the intention of the clause was, that the officers of the company should not be liable for losses arising from ordinary want of care, but only for something like intentional negligence or wilful disregard of the duties of their office. If the evidence at the trial should be such as Mr. Hannen suggests,—a long series of negligent acts,—that might warrant the jury in coming to the conclusion that the defendant had not been guilty of mere forgetfulness or want of care, but of something which amounted to wilful neglect. Upon the whole, reading the plea as I do, it seems to me to afford a good answer to so much of the declaration as it professes to answer. Judgment for the defendant.

HENDERSON and Another v. BAMBER. June 27.

1. No appeal lies to this court from the county-court, in respect of an order made in exercise of its powers in a winding-up proceeding under the 17th section of the Industrial and Provident Societies Act, 1862, 25 & 26 Vict. c. 87.

2. Whether the county-court, under the authority conferred upon it by that statute, has power to make an order restraining proceedings in the Liverpool Passage Court against a member of an industrial society registered under the 25 & 26 Vict. c. 89, which is being wound up in the county-court by virtue of the jurisdiction conferred upon it by the 25 & 26 Vict. c. 87, s. 17,—*quære?*

THIS was an appeal from an order of Wheeler, Serjt., one of the judges of the county-court of Lancashire, holden at Liverpool, restraining the appellants from further proceeding in an action brought by them against the respondent under the following circumstances:—

*541] 1. The Liverpool Equitable Co-operative Society for *several years prior to the 17th of December, 1862, carried on business in Liverpool, being a society formed and registered under the Industrial and Provident Societies Act, 1852.

2. On the 17th of December, 1862, the society obtained a certificate of registration under the Industrial and Provident Societies Act, 1862, under the style of "The Liverpool Equitable Co-operative Society, Limited."

3. The respondent was a member of the society before such registration, and continued a member thereof after registration in respect of the interests which he had therein before registration.

4. On the 16th of April, 1863, winding-up orders under the said act of 1862 and the Companies Act, 1862, were made by the said county-court upon the said petition of the said Liverpool Equitable Co-operative Society, Limited, and the petition of one James Neville,

a creditor of the society, in respect of debts incurred both before and after the registration of the society.

5. The appellants had supplied the society with goods both before and after registration; and, at the last-mentioned date, the account as stated by the appellants was as under:—

| | | | | | | | | |
|-----------------------------------------------------------|----------|----------|-----|----|---|-----------------|------|-------|
| "1862. | Oct. 8. | To goods | £38 | 6 | 3 | payable Dec. 31 | | |
| | Nov. 12. | " | £52 | 18 | 5 | " Feb. 12 | | |
| | Dec. 3. | " | £50 | 5 | 5 | " March 3 | 141 | 10 1 |
| "Cr. | | | | | | | | |
| "1862. | Dec. 3. | By goods | . | . | . | £8 | 6 | 3 |
| "1863. | Jan. 7. | " | . | . | . | 4 | 10 | 3 |
| | | By cash | . | . | . | 20 | 0 | 0 |
| | | | | | | | 32 | 16 6 |
| | | | | | | | £108 | 13 7 |
| "Goods supplied and cash paid for duty after registration | | | | | | | 20 | 5 11 |
| "Less cash, on account | | | | | | | 15 | 0 0 |
| | | | | | | | £5 | 5 11* |

*6. The respondent has been declared a contributory, and has had calls made upon him under the winding-up to the full extent of his interest in the society as a limited one under the act of 1862. [*542

7. The appellants claimed to prove against the society under the winding-up for the whole of the said sum of 113*l.* 19*s.* 6*d.*, and they were admitted to prove in respect thereof; but no dividend has yet been received by the appellants.

8. The appellants, on the 23d of February, 1865, issued their writ against the defendant out of the court of passage of the borough of Liverpool, for the sum of 108*l.* 13*s.* 7*d.* as being the balance of their account for goods supplied before registration.

9. The respondent thereupon applied to the judge to restrain proceedings.

10. On behalf of the appellants it was contended that the judge had no such power.

11. On the 27th of March last, the judge made his order restraining the appellants, and ordered them to pay the costs of the said application and order.

The question for the opinion of the court, supposing the court to consider that the right of appeal exists, is, whether the county-court had power to make the order now appealed from.

The costs of and incident to the obtaining of the order and to the appeal therefrom were to abide the event of the appeal.

Macnamara (with whom was *Hopwood*), for the appellants.(a)—The question in this case arises upon the *Industrial and Provident Societies Act, 15 & 16 Vict. c. 31, as amended by subse- [*543

(a) The points marked for argument on the part of the appellants were as follows:—

"1. That the right of appeal exists, and that this court is the proper court of appeal under the 17th section of the Industrial and Provident Societies Act, 1862, 25 & 26 Vict. c. 87, s. 17, and the Companies Act, 1862, 25 & 26 Vict. c. 89, s. 124:

"2. That the power of the county-court can be derived solely from some statutory enactment, and that neither the Industrial and Provident Societies Act, 1862, 25 & 26 Vict. c. 87, s. 17, nor the aforesaid Companies Act, 1862, 25 & 26 Vict. c. 89, s. 124, confer any such power as that alleged by the respondent and assumed by the county-court; and that the mere registration of

quent acts. [WILLES, J.—The county-court judge has issued an injunction against a proceeding in the Passage Court. The society is being wound up in the county-court under the Companies Act, 1862, 25 & 26 Vict. c. 89: and the question is, whether the judge had power to make such an order, and whether any appeal lies.] Those are the questions. The 17th section of the Industrial and Provident Societies Act, 1862, 25 & 26 Vict. c. 87, enacts that “any society registered under this act may be wound up either by the court or voluntarily, in the same manner and under the same circumstances under and in which any company may be wound up under any acts or act for the time being in force for winding up companies; and all the provisions of such acts or act with respect to winding up shall apply to such society, with this exception, that the court having jurisdiction in the winding-up shall be the county-court of the district in which the office of the society is situate.” This act, which passed on the 7th of August, 1862, repealed the former act relating to industrial and provident societies; and, until that act came into operation, this society was an irregular partnership only until it was registered, which *544] *was on the 17th of December, 1863. All the goods for the recovery of the price of which the action was brought in the Passage Court were supplied between the 8th of October and the 3d of December, 1862; and the order for winding up was made on the 16th of April, 1863. The action in the Passage Court commenced on the 23d of February, 1865, and the order for the injunction was made on the 27th of March, 1865. Now, the county-court could only have power to make that order under some statutory enactment. [MONTAGUE SMITH, J.—It will be said on the other side that the power is incidental to the power of winding up.] A mere partnership cannot be wound up. [WILLES, J.—An unregistered company may: 25 & 26 Vict. c. 89, ss. 200, et seq.] This is a society registered under the act; and the winding-up order treats it as a limited company. (a) The 197th section,—which enacts that “the court may at any time after the presentation of a petition for winding up a company registered in pursuance of this part (vii.) of this act, and before making an order for winding up the company, upon the application by motion of any creditor of the company, restrain further proceedings in any action, suit, or legal proceeding against any contributory of the company, as well as against the company, as hereinbefore provided, upon such terms as the court thinks fit,”—only applies where an action is brought in respect of a debt incurred by the company as a joint-stock company, and not by a mere partnership. In *Dean v. Mel-lard*, 15 C. B. N. S. 19 (E. C. L. R. vol. 109), it was held that the effect of the repeal of the former acts by the 25 & 26 Vict. c. 87, was, to render the members individually liable to be sued in respect of contracts made by the society prior to the passing of the repealing act, for which no action was then pending. [BYLES, J.—There *545] *was no winding-up there. Here the defendant was within the jurisdiction of the winding-up court; and the debt also.]

the company as a limited company cannot take away the rights of a creditor of the unlimited company, at all events so far as regards goods delivered before registration:

“3. That the fact of proving against the estate of the company, and being wrongly admitted, is no bar to the suit which has been restrained.”

(a) The order was not set out in the case.

Here the company are not liable for the debt. This is a claim against a member individually, not against the company. If the proceeding is to be restrained at all, it should have been by the court in which the action was brought, as in *Thomas v. Wells*, 16 C. B. N. S. 508 (E. C. L. R. vol. 111). Here, one court is put in conflict with another, whose jurisdiction is not inferior. [BYLES, J.—In *Thomas v. Wells*, the proceeding was in a superior court.] The contention there was, that the proper court to which to apply for a stay of the proceedings was the court in which the winding-up order was made. But Byles, J., in giving judgment, said: “The Master of the Rolls has no jurisdiction over the proceedings of this court: all he can do, is, to operate upon the person of the plaintiff, and to restrain him under pain of contempt. The more natural course I conceive to be that the court in which the action is brought should stay the proceedings, when it is made to appear that the action is brought in violation of an act of parliament.” That is a distinct authority to show that the county-court was not the proper court to apply to to stay the proceedings in the Passage Court. “The court,” under s. 81 of the Companies Act, 1862, means the High Court of Chancery, though jurisdiction in the winding-up is by s. 17 of the Industrial and Provident Act, 1862, given to the county-court. [BYLES, J.—By s. 17 of the last-mentioned act, the county-court judge is made the judge in equity for all purposes connected with the winding-up. The Court of Chancery might have stayed the proceedings in the Passage Court. I should think that power was intended to be given to the county-court, under this act.] The case of *Re The Sheffield and Hallenshire Ancient Order of Foresters’ *Co-operative and Industrial Society (Limited)*, [*546 12 Law T. (N. S.) 835, shows that the turning this partnership into a registered company cannot affect the rights of the creditors. The next question is, whether an appeal lies. That depends upon the construction to be put upon the 17th sect. of the 25 & 26 Vict. c. 87, and the 124th sect. of the 25 & 26 Vict. c. 89. The former enacts “that any society registered under this act may be wound up either by the court or voluntarily, in the same manner and under the same circumstances under and in which any company may be wound up under any acts or act for the time being in force for winding up companies; and all the provisions of such acts or act with respect to winding up shall apply to such society, with this exception, that the court having jurisdiction in the winding-up shall be the county-court of the district in which the office of the society is situate.” And the latter enacts that “rehearings of and appeals from any order or decision made or given in the matter of the winding-up of a company by any court having jurisdiction under this act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same court in cases within its ordinary jurisdiction.”

R. G. Williams (with whom was *C. Hardy*), contra, was stopped by the court.(a)

(a) The points marked for argument on the part of the respondents were as follows:—

“1. That no appeal lies to this court from the decision of the county-court judge upon the matter in question:

“2. That it was within the jurisdiction and power of the county-court judge to make the order in question.”

WILLES, J.—I am of opinion, upon the second point, that this appeal should be dismissed. The matter *appealed against does not appear to me to be one which it is competent for this court to entertain. The only enactment upon which reliance could be placed in order to sustain the affirmative of the proposition, is, the 17th section of the Industrial and Provident Societies Act, 1862, 25 & 26 Vict. c. 87, which enacts that “any society registered under this act may be wound up either by the court or voluntarily, in the same manner and under the same circumstances under and in which any company may be wound up under any acts or act for the time being in force for winding up companies.” This language is large enough to include the act passed in the same session (c. 89). The clause goes on,—“and all the provisions of such acts or act with respect to winding up shall apply to such society, with this exception, that the court having jurisdiction in the winding-up shall be the county-court of the district in which the office of the society is situate.” Thus, all the provisions as to winding up companies, either voluntarily or compulsorily, under the Companies Act, 1862, 25 & 26 Vict. c. 89, may be applied, so far as they are applicable, to a society registered under the 25 & 26 Vict. c. 87: and the county-court may exercise all the powers given in Part. iv. of the first-mentioned act. Now, it is material to see what those powers are, and by whom they were to be exercised. By s. 82, the power is to be put in motion by a petition; which is to be filed in the Court of Chancery, or a similar jurisdiction: s. 83. The first order to be made is an order for winding up the company: s. 86. By s. 92, official liquidators are to be appointed, whose duties are defined by s. 95. Then follow various provisions defining the powers ordinary and extraordinary of the court. Amongst these latter is s. 124, which relates to appeals from orders. It enacts that *548] “rehearings of and appeals from any order or decision *made or given in the matter of the winding up of a company by any court having jurisdiction under this act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same court in cases within its ordinary jurisdiction; subject to this restriction, that no such rehearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made, in manner in which notices of appeal are ordinarily given according to the practice of the court appealed from, unless such time is extended by the court of appeal: Provided that it shall be lawful for the Lord Warden of the Stannaries, by a special or general order, to remit at once any appeal allowed and regularly lodged with him against any order or decision of the vice-warden made in the matter of a winding-up, to the court of appeal in Chancery, which court shall thereupon hear and determine such appeal, and have power to require all such certificates of the vice-warden, records of proceedings below, documents, and papers, as the Lord Warden would or might have required upon the hearing of such appeal, and to exercise all other the jurisdiction and powers of the Lord Warden specified in the 18 & 19 Vict. c. 82; and any order so made by the court of appeal in Chancery shall be final.” Down to this point, the jurisdiction is one which is to be exercised only by the Court of Chancery. It is

necessary to bear that in mind, in considering whether the 124th section of the 25 & 26 Vict. c. 89, conjointly with the 17th section of the 25 & 26 Vict. c. 87, can give an appeal to a court of common law, which has neither an appellate nor original jurisdiction in respect of the 25 & 26 Vict. c. 89. I do not say that an appeal may not be given by implication: but I think it extremely unlikely that the legislature *should have intended, under the general words in the 17th section of the 25 & 26 Vict. c. 87, to give an appeal by impli- [*549] cation to a court having no jurisdiction whatever under the 25 & 26 Vict. c. 89. The objection acquires additional force from the very first words of the 124th section,—“Rehearings of and appeals from any order or decision made or given in the matter of the winding-up of a company by any court having jurisdiction under this act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same court in cases within its ordinary jurisdiction.” Here you have a section which is dealing with a jurisdiction in which every order for the winding-up of a company from the beginning to the end may be the subject of appeal. And it is impossible for us to assume a jurisdiction of this sort, unless we are prepared to assume it over all orders in a winding-up proceeding from the first to the last. There are many other reasons why an appeal should not lie to this court. I will particularly advert to two. Appeals from the county-court to the superior courts of common law are given in a cause or action (13 & 14 Vict. c. 61, s. 14), or an interpleader (19 & 20 Vict. c. 108). That clearly means a cause or action in the county-court; whereas, the order in question affects a proceeding in the Passage Court. The appellate jurisdiction given to the superior courts by the statutes referred to can have no application to proceedings of that description. But, in the next place, this court and the other superior courts are not courts of appeal from the county-court in causes which are within its ordinary jurisdiction, but only in respect of certain specified things. In respect of small matters, it was originally intended that there should be no appeal. The original jurisdiction of the county-court was defined by the 58th section of the 9 & 10 Vict. c. 95, which enacts *that “all pleas of personal actions, where [*550] the debt or damage claimed is not more than 20*l.*, whether on balance of account or otherwise, may be holden in the county-court, without writ; and all such actions brought in the said court shall be heard and determined in a summary way in a court constituted under this act, and according to the provisions of this act: Provided always that the court shall not have cognisance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction or breach of promise of marriage.” When the jurisdiction of the county-court was extended from 20*l.* to 50*l.* in respect of contracts, and from 5*l.* to 20*l.* in respect of torts, by the 13 & 14 Vict. c. 61, an appeal was given, by s. 14, in these words,—“If either party in any cause of the amount to which jurisdiction is given to the county-

courts by this act, shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of common law at Westminster." Then follows a provision for notice and for security to be given by the party appealing: and the section goes on,—“and the said court of appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of the said appeal as such court may think proper; and such orders shall be final.” Thus, the appeal, when given, is not from an order of the court made in the exercise of its ordinary jurisdiction, but only *where it is *551] dealing with a point of law or a matter of judicial procedure. Then, the 68th section of the 19 & 20 Vict. c. 108, gives an appeal in some cases where none was given by the 13 & 14 Vict. c. 61, s. 14. It enacts that “an appeal from the decision of a county-court, on the same grounds and subject to the same conditions as are provided by the 14th section of the 13 & 14 Vict. c. 61, shall be allowed in all actions of replevin where the amount of rent or damage exceeds 20*l.*, and in all actions for the recovery of tenements where the yearly rent or value of the premises exceeds 20*l.*, and in proceedings in interpleader where the money claimed or the value of the goods or chattels claimed, or of the proceeds thereof, exceeds 20*l.*, and in all actions where the parties agree that the court shall have jurisdiction.” These latter words throw light upon what goes before. Therefore the probabilities which suggest themselves to the mind when the question is first presented to it, are precisely in accordance with what the language of the legislature is found to indicate. It would require direct language to show this court to be a court of appeal in a matter which is properly and only within the jurisdiction of the Court of Chancery. Construing the section of the act of parliament in question by the light afforded by those to which I have referred, it seems to me that this court has no power to entertain this appeal, and therefore that it must be dismissed. I avoid expressing any opinion upon the validity of the order, or its effect, because, in the particulars I adverted to in the course of the argument, we are not in possession of materials to enable us to form a decisive judgment. The ground upon which I dispose of the case is this, that no appeal lies to this court from the county-court, in respect of an order made in exercise *552] of its powers in a *winding-up proceeding under the 17th section of the Industrial and Provident Societies Act, 1862.

BYLES, J.—I entirely concur in the ground upon which my Brother Willes has rested his judgment. I cannot help thinking, that, if we were to go further, some things would appear to be plain. It is plain that the county-court has jurisdiction in the case of registered societies. This person was a member both of the original society and of the registered society. The latter had all the property of the former. We are called upon to stay the proceedings under an order made in a matter in which the county-court had jurisdiction to make an order. We have not the order before us. It is difficult, therefore, to say whether it was one which it was competent to the court to make. We have no information as to what is the state of the assets of the

company. We cannot therefore say that the county-court judge had not jurisdiction to wind up this society so as to include the debt in question. If he had jurisdiction, and had not power to stay the proceedings in the Passage Court, his jurisdiction would be futile. I will only venture to say this much, that, as far as I have any information on the subject, I see nothing to satisfy me that the judge was wrong.

MONTAGUE SMITH, J., had gone to Chambers.

Appeal dismissed.

***THE CITY OF DUBLIN STEAM-PACKET COMPANY** [*553
v. THOMPSON. *July 10.*

The 28th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which empowers the commissioners of customs, with the approval of the board of trade, to make "such modifications and alterations as from time to time become necessary in the tonnage-rules thereby prescribed, in order to the more accurate and uniform application thereof and the effectual carrying out of the principle of admeasurement therein adopted," does not authorize them to make rules for the measurement of the tonnage of steam-vessels which will have the effect of altering the allowance in respect of the space occupied by the propelling-power, as provided by s. 23.

THIS was a special case stated by consent, without pleadings, for the opinion of the court:

1. The plaintiffs are a company trading between England and Ireland, and are possessed of many steam-vessels of large tonnage, which are used by them in their trade of carrying passengers and goods to and from England and Ireland.

2. The defendant is one of the surveyors of customs at the port of Liverpool, and represents the commissioners of customs, with whom the present question has arisen.

3. The question in dispute arises upon the construction of certain provisions of the Merchant Shipping Act, 1854, which regulate the mode of ascertaining the registered tonnage of steam-ships, and as to the power of the commissioners of customs to refuse the allowance for propelling-power, which, as the plaintiffs insist, is provided for by the act of parliament, as hereinafter mentioned.

4. By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 23, it is enacted, that "in every ship propelled by steam or other power requiring engine-room, an allowance shall be made for the space occupied by the propelling-power, and the amount so allowed shall be deducted from the gross tonnage of the ship, ascertained as aforesaid (ss. 21, 22), and the remainder shall be deemed to be the register tonnage of such ship; and such deduction shall be estimated as follows, that is to say,—

(a) "As regards ships propelled by paddle-wheels, in which the tonnage of the space solely occupied by *and necessary for the [*554 proper working of the boilers and machinery is above 20 per cent. and under 30 per cent. of the gross tonnage of the ship, such deduction shall be 37 one hundredths of such gross tonnage; and, in ships propelled by screws, in which the tonnage of such space is above 13 per cent. and under 20 per cent. of such gross tonnage, such deduction shall be 32 one hundredths of such gross tonnage.

(b) "As regards all other ships, the deduction shall, if the commis-

sioners of customs and the owner both agree thereto, be estimated in the same manner; but either they or he may in their or his discretion require the space to be measured and the deduction estimated accordingly; and, whenever such measurement is so required, the deduction shall consist of the tonnage of the space actually occupied by or required to be enclosed for the proper working of the boilers and machinery, with the addition in the case of ships propelled by paddle-wheels of one-half, and in the case of ships propelled by screws of three-fourths of the tonnage of such space; and the measurement and use of such space shall be governed by the following rules, that is to say,—

(1) "Measure the mean depth of the space from its crown to the ceiling at the limber strake; measure also three, or, if necessary, more than three breadths of the space at the middle of its depth, taking one of such measurements at each end and another at the middle of the length; take the mean of such breadths; measure also the mean length of the space between the foremost and aftermost bulk-heads or limits of its length, excluding such parts, if any, as are not actually occupied by or required for the proper working of the machinery; multiply together these three dimensions of length, breadth, and depth, and the product will be the cubical contents of the space below the crown. *Then find the cubical contents *555] of the space or spaces if any above the crown aforesaid which are framed in for the machinery or for the admission of light and air, by multiplying together the length, depth, and breadth thereof; add such contents to the cubical contents of the space below the crown; divide the sum by 100, and the result shall be deemed to be the tonnage of the said space.

(2) "If in any ship in which the space aforesaid is to be measured, the engines and boilers are fitted in separate compartments, the contents of each shall be measured severally in like manner according to the above rules, and the sum of their several results shall be deemed to be the tonnage of the said space.

(3) "In the case of screw-steamers in which the space aforesaid is to be measured, the contents of the shaft-trunk shall be added to and deemed to form part of such space, and shall be ascertained by multiplying together the mean length, breadth, and depth of the trunk, and dividing the product by 100.

(4) "If, in any ship in which the space aforesaid is to be measured, any alteration be made in the length or capacity of such space, or if any cabins be fitted in such space, such ship shall be deemed to be a ship not registered until remeasurement."

(5) "If, in any ship in which the space aforesaid is to be measured, any goods or stores are stowed or carried in such space, the master and owner shall each be liable to a penalty not exceeding 100l."

5. And by the 29th section of the same act it is further enacted as follows,—"The commissioners of customs may, with the sanction of the treasury, appoint such persons to superintend the survey and admeasurement of ships as they think fit, and may, with the approval of the board of trade, make such regulations for that purpose as may *556] be necessary, and *also, with the like approval, make such modifications and alterations as from time to time become

necessary in the tonnage rules hereby prescribed, in order to the more accurate and uniform application thereof, and the effectual carrying out of the principle of admeasurement therein adopted."

6. There are several other sections of the act which have some bearing on this question, and to which it may be useful to refer, viz., sections 20, 21, 84, 86, and 87.

7. On the 23d of October, 1860, the commissioners of customs, with the approval of the board of trade, issued the following rules:—

"23d October, 1860.

"In pursuance of the powers granted by the 29th section of The Merchant Shipping Act, 1854, the board, with the approval of the board of trade, direct, with a view to the more accurate and uniform application of the principle of granting certain allowance to steamers for their propelling-power, that, in lieu of the rules set forth in section 23 of the Merchant Shipping Act, and in paragraphs 4, 5, 6, 18, and 20 of instructions to measuring surveyors of 1855, the following rule be adopted in future, viz.

"Rule. In every ship propelled by steam or other power requiring engine-room, an allowance of space or tonnage shall be made for the space occupied by the propelling-power, and the amount so allowed shall be deducted from the gross tonnage of the ship, and such deduction shall be estimated as follows, that is to say,—

(1.) "Measure the mean length of the engine-room between the foremost and aftermost bulkheads in limits of its length, excluding such parts (if any) as are not actually occupied by or required for the proper working of the machinery; then measure the depth *of the ship at the middle point of this length, from the ceiling at [*557 the limber strake to the upper deck in ships of three decks and under, and to the third deck or deck above the tonnage-deck in all other ships; also the inside breadth of the ship clear of sponging (if any) at the middle of the depth; multiply together these dimensions of length, depth, and breadth, for the cubical contents; divide this product by 100, and the quotient shall be deemed to be the tonnage of the engine-room, or allowance to be deducted from the gross tonnage on account of the propelling-power.

(2.) "In the case of ships having more than three decks, the tonnage of the space or spaces betwixt decks, if any, above the third deck, which are framed in for the machinery or for the admission of light and air, found by multiplying together the length, breadth, and depth thereof, and dividing the product by 100, shall be added to the tonnage of such space.

(3.) "In the case of screw-steamers, the tonnage of the shaft-trunk shall be deemed to form part of, and added to, such space, and shall be ascertained by multiplying together the length, breadth, and depth of the trunk, and dividing the product by 100.

(4.) "In any ship in which the machinery may be fitted in separate compartments, the tonnage of each such compartment shall be measured, severally, in like manner, according to the above rules, and the sum of their results shall be deemed to be the tonnage of the said space.

"Ordered, That the proper officers in London, and the collectors and comptrollers at the outports, do govern themselves accordingly.

in all future operations for estimating the allowance to steamers for their propelling-powers; and, with regard to the engine-rooms or allowance to steamers already measured, that they be remeasured *558] agreeably to the above *modification of the rule, on the application of their owners or agents, and on delivery of the original certificates for endorsement."

8. At the time of the passing of the Merchant Shipping Act, 1854, the plaintiffs were and still are possessed of (amongst other ships) the paddle-wheel steamship *St. Columba*. Her tonnage-space solely occupied by and necessary for the proper working of the boilers and machinery was and is above 30 per cent. of her gross tonnage.

9. After the passing of the said act, the plaintiffs applied, in accordance with the provisions thereof, to have the said ship measured, and the vessel was accordingly measured by the proper officer, and a deduction for the space occupied by the propelling-power was allowed according to clause (b) of the 23d section of the act, including the addition of one-half the tonnage of the space of the propelling-power. Her register-tonnage for dues was then ascertained and fixed at 206 tons, and her tonnage was accordingly so entered in the registry of shipping in the port of Dublin.

10. In 1862, the plaintiffs lengthened the said ship *Saint Columba* by adding to her length forty feet; and, as this increased her tonnage, it became necessary, in accordance with the provisions of the Merchant Shipping Act, 1854, to have her remeasured; and she was accordingly remeasured by the proper officer for the purpose in the port of Liverpool, where the alterations in her were being made, and without any application for the purpose being made by the plaintiffs. Her tonnage-space solely occupied by the propelling-power was then above 30 per cent. of her tonnage, as before mentioned.

11. On this remeasurement, the gross tonnage of the ship was *559] increased by 122 tons. The officers who *conducted the measurement measured her according to the directions contained in the new Customs Rules of October 23d, 1860. They allowed only the exact space occupied by or required to be enclosed for the proper working of the boilers and machinery, and declined to allow the one-half the tonnage of the said space, as directed by the 23d section of the said act. By this mode of measurement, the tonnage for dues was increased to 456 tons. The plaintiffs objected to this mode of measuring and making the allowance for the propelling-power, and required to have the allowance made according to their views of the provision of the act of parliament, and insisted that the commissioners of customs had no power to refuse such allowance.

The question for the opinion of the court was, whether the additional allowance of one-half the tonnage of the space occupied by the propelling-power ought or ought not to have been made by the officers of registry at Liverpool. If the court should be of opinion in the affirmative, then judgment was to be for the plaintiffs for 40s. and costs. If in the negative, then judgment was to be for the defendant, with costs.

Bovill, Q. C. (with whom was *Watkin Williams*), for the plaintiffs, contended, that, in calculating the tonnage-space of their vessel, the *St. Columba*, they ought to have been allowed the additional deduc-

tion of one-half the tonnage of the engine and boiler space, in accordance with the express provisions of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 23(b); and that the commissioners of customs had no power by any rules or regulations to repeal or alter the express provision in the statute for such allowance. He referred more particularly to the 6th, 19th, 21st, 22d, 23d, 28th, 29th, 30th, 32d, 35th, 36th, and 38th sections of the act; and submitted that the matter in *question was not a rule of measurement, which the commis- [*560 sioners were empowered by s. 29 to interfere with or alter, but a principle of allowance given by the statute, which could only be altered or taken away by the legislature.

The Solicitor-General (with whom were *H. Giffard*, Q. C., and *C. Pollock*), for the defendant, contended that the commissioners of customs, with the consent and approval of the board of trade, were empowered by the 29th section of the Merchant Shipping Act, 1854, to alter the rules laid down in s. 32 for computing the allowance to steamers, in consequence of that rule, by its inaccurate and unequal working, having been found to violate the principle of allowance prescribed by that act, viz. the space occupied by the propelling-power. He submitted that it was obviously within the scope of the authority conferred upon the commissioners by the 29th section, to alter the rules laid down in s. 23, for the purpose of more perfectly and uniformly carrying out the principle of allowances contemplated by the legislature.

Bovill, Q. C., in reply.—The object of the power conferred upon the commissioners by s. 29 is, to secure uniformity of measurement, not to enable them to alter the allowances which the statute has expressly provided shall be made. *Cur. adv. vult.*

KEATING, J., now delivered the judgment of the court: (a)—

In this case a steamship belonging to the plaintiffs, called the *St. Columba* (paddle-wheel), at the passing *of the 17 & 18 Vict. [*561 c. 104 (the Merchant Shipping Act), had been measured under the provisions of the 23d section of that statute, and its register tonnage ascertained in the mode pointed out thereby. An increase, however, in the length of the ship in 1862, by augmenting her tonnage, rendered a fresh survey necessary, and she was accordingly remeasured in pursuance of the directions contained in certain new customs rules of October the 23d, 1860, framed by the commissioners of customs, with the sanction of the board of trade, the application of which to the plaintiffs' ship increased the registered tonnage beyond that which would have resulted from a measurement under the former system. To this the plaintiffs objected, and contended that the new rules issued by the commissioners of customs were inoperative, as contrary to the provisions of the act of parliament: and the question for the court is, whether they are right in that contention: and we think they are.

The 23d section of the Merchant Shipping Act provides, that, in every ship propelled by steam, an allowance shall be made for the space occupied by the propelling-power, and the amount so allowed shall be deducted from the gross tonnage of the ship, "and such de-

(a) The case was argued at the sittings in banco after last Trinity Term, before Willes, J., Byles, J., and Keating, J.

duction shall be estimated as follows," that is to say, as to paddle-wheel ships in which the tonnage of the space occupied by boilers, machinery, &c., is above 20 and under 30 per cent. of the gross tonnage, the deduction "shall be" $\frac{3}{10}$ ths of such gross tonnage; and, in screw steamships, where the tonnage of such space is above 13 and under 20 per cent. of such gross tonnage, such deduction shall be $\frac{2}{10}$ ths of such gross tonnage. In all other ships, where there is no agreement between the commissioners and the owner, the deduction shall consist of the actual space occupied by machinery, &c., with the
 *562] addition, in case of *paddle-wheels, of one-half, and in case of screws, of three-fourths of the tonnage of such space; "and the measurement and use of such space shall be governed by the following rules, that is to say,"—and then follow five rules for measuring the space referred to.

The 29th section of the act gives power to the commissioners, with the sanction of the board of trade, to make such modifications and alterations in the tonnage-rules, as from time to time become necessary, "in order to the more accurate and uniform application thereof, and the effectual carrying out the principle of admeasurement therein adopted."

It was under this section that the new rules referred to were made: and those rules in effect repeal the provisions of s. 23 of the statute as to all distinction between the different classes and kinds of steam-vessels therein referred to, as well as the different deductions appropriated thereby to each class, and substitute one uniform allowance for all classes of steam-vessels, together with a new mode of ascertaining by admeasurement such allowance.

The Solicitor-General, for the defendant, contended that the provisions in the statute establishing the distinctions referred to were not enactments properly so called, but merely tonnage-rules, the alteration of which by the commissioners came within the express powers conferred upon them by s. 29; that, although s. 23 was subdivided into several rules, yet that it was itself a tonnage-rule, and so within those powers: and he referred to the mode in which the rules were designated in the margin of the statute, in support of his view. On the other hand, it was insisted that the tonnage-rules referred to in s. 29 of the act were the rules specified as such in the different sections of that part of the statute, and which regulated the mode of measure-
 *563] ment, and nothing more; that the allowance of any *deduction from the gross tonnage was not more clearly an enactment than the direction that such deduction should be estimated according to the specified differences in the classes of vessels enumerated in the section; whilst the mode of measuring the spaces according to such classification is expressly governed by the five rules set out at the end of the section: nor could the statements in the margin control or affect the terms of the enactment.

We think this the correct view of the statute, and that it was not the intention of the legislature to give to the commissioners the powers contended for by the defendants.

Whether the new rules, as framed, would or would not be beneficial to the merchant service of the country, is a question which, although mooted at the Bar, we do not inquire into; the rules them-

selves being, in our opinion, *ultra vires*. Our judgment will therefore be for the plaintiffs. Judgment for the plaintiffs.

JOHNSON and Another v. CHAPMAN. July 10.

Deck-cargo (timber) lawfully laden pursuant to charter-party, having broken adrift in consequence of stormy weather, and impeding the navigation and endangering the safety of the vessel, was necessarily thrown overboard:—Held, that the shipper was entitled to claim general average in respect thereof, as against the shipowner.

THE following case was stated for the opinion of the court, without pleadings, pursuant to the 46th section of the Common Law Procedure Act, 1852:—

1. The plaintiffs are the owners of the vessel the *Shooting Star*, and the defendant is a merchant carrying on business in London, under the name and firm of E. H. Chapman & Co.

*2. On the 26th of May, 1863, a charter-party was made by and between the plaintiffs and the defendant, as follows:— [*564

“Memorandum of charter-party.

“Liverpool, 26th May, 1863.

“It is this day mutually agreed between John S. De Wolfe & Co., agents for owners of the good ship or vessel called the *Shooting Star*, George Perkin, master, and of the measurement of 1160 tons or thereabouts, now in Bristol, and E. H. Chapman, Esq., of London, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to Quebec, with liberty to take cargo from Bristol Channel for owners' benefit, or so near thereto as she may safely get, and there load from the factors of the said charterers a full and complete cargo of deals, *including a deck-load*; one-half the cargo to be floated deals at the bottom, and the remainder dry deals, and deal-ends and staves as required by the master for broken stowage only, with deals or deal-ends or [and] staves and [or] for broken stowage, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, shall therewith proceed to London or so near thereunto as she may safely get, and deliver the same on being paid freight as follows:—For timber, — per load of 50 feet (Customs calliper measure); deals per Petersburg standard hundred, 4*l.* 17*s.* 6*d.*; deal-ends, per ditto, 3*l.* 5*s.*; staves, per mille of standard pipe, 9*l.*; lathwood, per fathom of 4 feet, —; the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, navigation, of whatever nature and kind soever during the said voyage, always excepted: One-third of the freight to be paid in cash on arrival, and the remainder by good and approved bills *payable in London at four months' date from [*565 right delivery of cargo, or in cash deducting four months' interest: Twenty-five running days are to be allowed the charterer, if the ship be not sooner despatched, for loading, and to discharge in London as fast as she can deliver, according to the custom of the port, and ten days on demurrage over and above the said laying days, at 15*l.* per day. It is hereby agreed the owners of the vessel shall have

a lien on the cargo for freight, dead-freight, and demurrage. The custom of each port to be observed in all cases. Penalty for non-performance of this agreement, estimated amount of freight. Charterers to pay two-thirds dock-dues, as usual."

3. In pursuance of the said charter-party, the *Shooting Star* duly proceeded to Quebec, and loaded there from the defendant's factors a full and complete cargo of deals and staves, *including a deck-load*; and, being so loaded, duly proceeded, in pursuance of the said charter-party, from Quebec to London:

4. During the aforesaid voyage from Quebec to London, certain portions of the deck-load on board the *Shooting Star* were jettisoned: and the circumstances under which this took place were those which are stated in the following protest; all the facts stated in which protest were to be taken as admitted, and as forming part of this special case:—

"By this public instrument of protest, Be it made known, that, on the 3d day of November, 1863, before me, W. Duff, of the city of London, notary public duly admitted and sworn, personally came and appeared George Perkin, mariner, master of the ship or vessel called the *Shooting Star*, of Liverpool, of the burthen of 1160 tons or thereabouts, Which said appearer declared that the said ship, being tight, *566] staunch, and strong, and well and sufficiently manned, fitted, *victualled, tackled, apparelled, provided, and furnished for a voyage from Quebec to the port of London, and having received and well and properly loaded and stowed on board of her at Quebec aforesaid a cargo of deals and staves, with the deck-load and boats properly secured, for the said port of London, did on the 5th day of October last past weigh anchor and set sail from Quebec aforesaid on her said voyage, and prosecuted the same with for the most part fair winds and moderate weather, and without material occurrence to the knowledge of him the said appearer, until towards noon of the 13th day of the same month, when the breeze freshened, and at about 1 o'clock P. M. of the same day it blew a strong and increasing gale from W. S. W., and being accompanied by a fast rising sea, and causing the said ship to labour and strain excessively. Sail was reduced to close reefs to ease her; but she nevertheless laboured and strained very severely, and took so many heavy seas on board that her decks were continually flooded, and the deck-load was broken adrift, whereupon the same was secured as well as possible; and the pumps were kept constantly attended; and at dusk of the same day the carpenter, having sounded the well, reported three feet of water in the ship; and the gale strengthening and raging with great fury, and the said ship being on a lee-shore was hauled to the wind, there being no room to heave her to, and all hands were set to work at the pumps, the water in the well at midnight having increased to five feet: That, at — A. M. of the following day, the gale raged with unabated fury, accompanied by a tremendous heavy cross-sea, which broke over the said ship in such immense bodies as to keep her decks continually inundated; and the said ship, labouring and straining excessively, and making a great *567] deal of water, and the deck-load constantly breaking adrift, *and having damaged one of the boats, the said appearer was compelled, for the safety and preservation of the said ship, her cargo,

and of all on board, to throw part of her deck-load overboard, to prevent it doing further damage; but the said ship nevertheless made very bad weather of it until — P. M. of the same day, when, the gale somewhat abating, the upper top-sails were set reefed, to keep the ship's head to the sea, and all hands were on deck keeping the pumps constantly going, until about 6 o'clock P. M., when one of the pumps sucked, and the people, being much exhausted, were sent below: That, at — A. M. of the 20th day of the same month, the said ship experienced a strong gale blowing in heavy squalls, with a high sea running, causing the said ship to labour and strain excessively; and at 6 o'clock of the same morning the main-sail was reefed, to ease the ship; but she nevertheless made very bad weather of it; and as the day advanced, it blew a very strong and increasing gale, with a tremendous sea on, and the said ship took such immense bodies of water over all that her decks were continually inundated, and she made so much water that her pumps were of necessity constantly kept going, and at 4 P. M. she was kept more before the sea, and the upper top-sails and jib were furled, to ease her; but she suffered bitterly, and made very heavy weather of it: That the following day commenced with very heavy gales and a mountainous cross-sea, and the said ship, making fearful weather of it, took immense bodies of water over all; and at half-past 2 A. M. she shipped a very heavy sea on the port-beam, which stove the long boat in bits, split the port side of the whale-boat from the keel upwards, knocking the skid on which the boat was resting against the gig, thereby staving in four planks of the gig's starboard bow, and opening her along from the stem to the keel, knocking *the port-quarter away, and breaking the gunwales, [*568 and damaging a fourth boat, at the same time shifting the deck-load against the pumps on both sides, so that they could not be worked, and filling the cabin with water, and doing other considerable damage: That, as soon as possible, the deck-load was secured as well as circumstances would permit, and the pumps set to work, and they were kept at work until 4 o'clock P. M. of the same day, when they sucked; and shortly thereafter the gale abated, the wind hauling to the N. E., and continuing to moderate; and, the sea subsiding, sail was made, as necessary: That, in the morning of the 23d day of the same month, the said ship experienced a heavy swell from the eastward, which caused her to labour and strain very much throughout the day, and at about 5 o'clock P. M. of the same day she was struck by a heavy squall, which carried away the jib-sheet, thereby splitting the jib, and shortly thereafter the wind increased to a gale, and sail was shortened; and at midnight, it blowing a strong gale, accompanied by a tremendous heavy sea, and the said ship suffering bitterly, she was brought under lower top-sails and fore-top-mast stay-sail, to ease her, and she continued to labour and strain very severely, and made very bad weather of it until about 3 o'clock A. M. of the following day, when, the weather moderating, sail was made, as necessary; the pumps being at all times well and carefully attended: That, at 2 o'clock P. M. of the same day, the wind increased, blowing from N. E., and all light sails were taken in, and at 6 o'clock, the wind still increasing and blowing a heavy gale, and the said ship suffering bitterly was brought under lower fore and main top-sails and fore-top-mast stay-sail,

to ease her; but she nevertheless laboured and strained very heavily, rolling about fearfully; and she made so much water throughout the day that her *pumps were obliged to be kept constantly going *569] to keep her free: and at 4 A. M. of the 25th day of the same month, the gale increasing to a perfect hurricane, and being accompanied by a tremendous high and heavy sea, which broke over the said ship in such immense bodies as to flood her deck, her deck-load was again broken adrift, and knocked against the pumps on both sides; and the said appearer was compelled, in order that the crew might work the pumps, and to prevent damage to the bulwarks and pumps, and for the safety and preservation of the said ship, her cargo, and of all on board, to throw a further portion of the deck-load overboard; and, the said ship shipping and making so much water, there being five feet six inches in the well, the pumps were of necessity kept constantly going: That the said ship continued to labour and strain very much, and to suffer bitterly; and at 2 o'clock P. M. of the same day, the main-top-sail was split by the violence of the gale, whereupon it was unbent, and the mizen-top-sail set close reefed, and the said ship continued to make very bad weather of it, notwithstanding every endeavour was made to ease her, until the following morning, when the gale abated, and sail was made, as necessary, the pumps being at all times carefully attended: That thereafter the said ship prosecuted her said voyage with for the most part fair winds and moderate weather, and without material occurrence, to the knowledge of him the said appearer; and, finally, on the 2d day of November aforesaid, arrived in safety in the Commercial Dock, in the said port of London: And, lastly, the said appearer declared, that, throughout the whole of the said voyage, every exertion was made and endeavour was used, by pumping and otherwise, to ease and prevent damage to the said ship, her appurtenances, and cargo; and that the losses and damages aforesaid, and any other loss or *damage which may have happened *570] or come thereto in the course and prosecution of the said voyage, were and are in no wise owing unto or occasioned by any unfitness or insufficiency of or in the said ship, her tackle, apparel, or appurtenances, nor unto or by any neglect, default, misconduct, or malconduct of him the said appearer, his officers or mariners; but solely and entirely unto and by the gales and bad weather and high seas aforesaid, and the perils of the seas, and the winds and the waves, and the violence thereof: And therefore he the said appearer required of me the said notary to protest in manner following: Whereupon I the said notary, at the request aforesaid, have protested and by these presents do solemnly protest against all persons whom these presents and the matters and things herein contained, do, shall, or may concern, for all losses, average losses, sums of money, costs, charges, damages, and expenses suffered, sustained, incurred, paid, laid out, and expended, and to be suffered, sustained, incurred, paid, laid out, and expended by reason, on account, or in consequence of the premises," &c.

5. All the goods loaded on board the Shooting Star at Quebec as aforesaid have been duly delivered to the defendant, with the exception of those goods which were jettisoned as aforesaid.

6. The plaintiffs contend that the loss of the goods so jettisoned as aforesaid is a particular average loss, in respect of which no contribution is due from them to the defendant. The defendant, on the other

hand, contends that the said loss is a loss in respect of which contribution is payable by the plaintiffs to the defendant.

7. It is admitted that hitherto it has been the practice of average adjusters not to allow as general average the jettison of such portion of the deck-load as is immediately before the jettison in a state of *wreck. But this admission is to be taken without prejudice [*571 to the right of the defendant to contend that such practice can not affect the law.

8. The court was to be at liberty to draw inferences of fact, in the same way as a jury would be entitled to do.

The question for the opinion of the court was, whether the defendant was under the circumstances of the case entitled to any contribution from the plaintiffs in respect of the goods jettisoned as aforesaid.

If the court should be of opinion in the negative, then judgment was to be entered up for the plaintiffs for 103*l.* 14*s.* 7*d.*, together with interest from the 16th of March, 1864, and costs of suit. If the court should be of opinion in the affirmative, then judgment of nolle prosequi, with costs of defence, was to be entered up for the defendant.

Cohen, for the plaintiffs.(a)—The deck-cargo was not thrown overboard in order to lighten the ship. It was only when it had broken adrift that it was sacrificed; *and then it was done for the purpose of preventing it from occasioning further damage. Both [*572 jettisons are alike in this respect. The case therefore falls within the principle enunciated in *Baily on Average*, 2d edit. 25,—“The loss must not be caused by the sacrifice of an article which is the immediate cause of the impending injury which renders its sacrifice necessary.” At p. 28, the author treats of the necessity of throwing overboard cargo which has become heated. He says: “Cargo may be so heated that the voyage cannot be continued with it on board the vessel, unless it be cooled. When there is no possibility of cooling it, a jettison of it is justifiable; but, when it can be cooled, which is often practicable, by putting into a port of refuge, and there discharging and airing it, a jettison of it is not justifiable.” [WILLES, J.—Does Mr. Baily draw a distinction between heating by a peril insured against, and heating by reason of an inherent defect of the cargo?] He does not. In 2 *Arnould on Insurance*, § 329, it is said: “Jettison is defined in the Rhodian law(b) to be *jactus mercium factus levandæ navis gratiâ*, a heaving overboard of the goods in order to save the ship. It is the most perfect example of a general average loss, and, when made intentionally, for the sake of saving the whole adventure from imminent danger, is generally admitted as giving a

(a) The points marked for argument on the part of the plaintiffs were as follows:

“1. That it appears from the protest that the cargo jettisoned would have been lost had it not been thrown overboard:

“2. That the necessity of throwing the cargo overboard was the immediate consequence of damage which the cargo had sustained, and of an accident which the cargo met with, and that the *causa causans* of the loss by jettison was not a peril which threatened the safety of the ship:

“3. That the jettison was under the circumstances a particular average loss, and that it was not a loss entitling the defendant to any contribution from the plaintiffs:

“4. That the practice set out in the seventh paragraph of the special case is not inconsistent with any legal principle, and is binding on the defendant:

“5. That the cargo jettisoned was practically lost before the jettison.”

(b) *Dig. lib. xiv., tit. 2, fo. 1.*

claim to contribution." "Where, in the course of the voyage, in order to save a ship from foundering, to float her after stranding, or to enable her to make a port of distress, part of the cargo is put into boats and lighters, and lost before reaching the shore, such loss gives *573] a claim to general average contribution." (a) In 2 *Phillips on Insurance, § 1288, it is said: "If goods put into boats out of the usual course, for the purpose of floating the ship when she is aground, or to lighten her that she may pass over a shoal or bar, or otherwise for the relief of the ship and cargo, are lost, they must be contributed for. A vessel having sprung a leak at sea, a part of the goods were taken out and put on board of other vessels to lighten her, that the leak might be found and stopped. She was thus enabled to proceed on her voyage, and finally arrived at her port of destination. The goods taken out were captured. The goods thus lost were contributed for in general average." Again, § 1289, "In case of goods being put into a lighter from a stranded ship, not to lighten it, but merely to save the goods, and of a jettison of part of them, the ship and cargo, being saved, do not contribute for the jettison." Arnould, in § 330, thus sums up the result of the authorities,—"On the whole, therefore, the law on this subject seems to be, 1. That, where goods are sold by the captain in order to raise funds for repairing particular average losses, or for defraying the ordinary expenses of the navigation, the loss arising from their sale must be made good by the shipowner alone, who must, in such case, pay the merchant the price which the goods would have fetched at their place of destination, deducting therefrom the freight which would have been due for their conveyance. 2. Where, on the other hand, they are sold for the purpose of defraying expenses or repairing losses which are themselves of the nature of general average, the loss arising from their sale gives a claim to a general average contribution; the goods sold are considered as though they had been jettisoned, and are made good, as we shall presently have occasion to remark, upon precisely the same principles of contribution." Again, Bailly says, p. 56: "Cargo may also *574] be *jettisoned because it is in 'a state of wreck,' i. e., in a position, owing to an accident to the cargo itself, inconsistent with the proper navigation of the ship; in which case principle 7 (b) excludes from general average the loss caused by such a jettison. Principle 7 excludes from general average everything that is the cause of the danger which renders its sacrifice necessary: but it may not at first sight appear evident why cargo is the cause of danger when in this state, more than when it is in its place. The application of principle 7 to it when in 'a state of wreck,' therefore, requires explanation. When a vessel puts to sea in moderate weather, properly equipped, and with her cargo well and properly stowed, she is in perfect safety, so far as that expression is applicable to a vessel at any time; and therefore the cargo is not the cause of danger under such circumstances; for no danger exists. If, with similar weather, she went to sea with part of her cargo adrift, so that it was liable to shift

(a) Referring to Emerigon, Chap. xii., s. 41, Vol. i., p. 599, edit. 1827; Benecke, *System des Assurances*, Vol. iv., pp. 56, 57, edit. 1810; and Bailly on Average, 60, 2d edit.

(b) "The loss must not be caused by the sacrifice of an article which is the immediate cause of the impending injury which renders its sacrifice necessary."

from side to side, no nautical man would contend that the ship went to sea in perfect safety. Danger, therefore, exists in this case, and the cargo which is adrift must be the cause of it; for, all other circumstances are the same as in the previous case, when no danger existed. The same principle and reasoning apply when the vessel is at sea in a storm; for, however violent the storm may be, if it is not necessary to throw overboard any portion of the cargo when it is in its place properly secured, and it is necessary when it is adrift and out of its place, the cargo which is adrift and out of its place is the cause of the danger which renders its sacrifice necessary. This principle will apply, *in practice*, to exclude the loss caused by *the jettison of cargo in a state of wreck, when even it might [*575 have been necessary to throw it overboard if it had not been adrift and out of its place; for; its being adrift and out of its place is *prima facie* a cause of danger,—and that it is out of its place is a fact; whereas, that the circumstances were such that the sacrifice would have been necessary if it had not been in that state, can be but an opinion: and a fact should always be preferred to an opinion. This principle does not apply to anything not itself in a state of wreck, but sacrificed because something else is in a state of wreck; for instance, it does not apply to the leeward side of a deck-load in the following case:—The windward side is washed adrift, and the vessel in consequence has a list to leeward, owing to the leeward side being without the counterpoise of the windward side: this list renders necessary the jettison of the leeward side, and by the jettison the danger is avoided. In such a case, the absence of the windward side is the cause of the danger which renders necessary the jettison of the leeward side.” [WILLES, J.—Does not Baily mean cargo adrift in consequence of bad stowage, not by reason of the storm?] It is submitted not. In Arnould, § 331, it is said: “If part of the ship be sacrificed for the general safety, it is contributed for in general average. Thus, masts cut away, anchors heaved overboard, cables cut, guns and ship’s stores jettisoned in order to save the whole adventure, are everywhere the subjects of general average. If a mast be carried overboard by the wind, it is, of course, only a particular average loss: if, however, a mast or spar be snap’t or sprung by the wind, and left hanging in the rigging, so that, in *order to save the ship and cargo*, it becomes necessary to cut away entirely both the mast and the rigging, and throw both overboard, the damage caused by the act of so cutting them away is a *general average loss, and is to be contributed [*576 for to the extent of the value of the mast and rigging, as they lay after the accident. If cables are *cut* or anchors *abandoned*, in order to avoid any impending peril, as, for the purpose of putting to sea in order to escape a lee-shore in a gale of wind, this is a general average loss:” and for this are cited the following authorities,—2 Phillips on Insurance, 3d edit. 80; 1 Magens’ Case 27; and Baily on General Average, 2d edit. 67. Baily, at p. 61, says: “Guns, spars, chains, anchors, hawsers, boats, and other ship’s stores are sometimes jettisoned, either to relieve the ship in a case of extreme peril, or to get at the cargo in order to jettison it for the same purpose. The loss so accruing is allowable in general average, subject to the following exceptions:—When the reason for the jettison is, that they are ‘in a

state of wreck,' their loss is, under principle 7, excluded from general average. Under this head will come,—spars thrown overboard because they have been broken adrift, and, rolling about the deck, endanger the lives or impede the actions of the crew. A boat washed from its chocks to leeward, and thrown overboard, either in a damaged or undamaged state, because it impedes the navigation of the vessel." Upon these authorities it is submitted that the practice set out in the 7th paragraph of the special case is not inconsistent with the law, and that consequently the plaintiffs are entitled to recover.

Sir G. Honynman, contra.—No authority has been cited in support of the argument for the plaintiffs, except Baily, who, after all, is only theoretical. The circumstance of this being deck-load does not take it out of the general rule. The case of *Gould v. Oliver*, 4 N. C. 134, 5 Scott 445, shows the principle upon which this case must be determined. *577] Tindal, C. J., in delivering the judgment of the court there, says: "The general rule laid down by the foreign authorities, and adopted by our own law, is, as is well known, that all goods thrown overboard for the preservation of the ship and cargo, shall be entitled to contribution. Upon this general rule, however, there is engrafted an exception by the foreign writers, 'that goods laden on the deck and cast into the sea shall not receive contribution; saving to the owner of the goods his recourse against the master or shipowner:' Consul. del Mare 183; Ordinance, liv. 3, tit. 8, art. 13; Emerigon, ch. 12, s. 42; Code de Commerce, art. 421. Now, where the loading on the deck has taken place with the consent of the merchant, it is obvious that no remedy against the shipowner or master for a wrongful loading of the goods on deck can exist. The foreign authorities are indeed express on that point: Valin, tit. du Capitaine, art. 12; Consul. del Mare, c. 183. And the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasioned his loss, leads to the same conclusion. Unless, therefore, the owner of the timber in this case has a claim for contribution against the owner of the ship, he is without any remedy whatever against any one, but must himself bear the whole of the loss in consequence of his timber having been thrown overboard for the benefit of all,—an inference directly at variance with the general rule above laid down, and, indeed, contrary to the authority of the foreign writers. For, Valin lays it down that the rule of art. 13 does not apply in respect of boats and other small vessels going from port to port, 'where the usage is to load merchandises on the deck.' The latter words of which text-writer give the reason for throwing such a case out of the exception into the general *578] rule for contribution, at least so far as the ship is concerned. As to the authorities in the English courts, there is no one which states directly that goods laden on deck shall in no case be entitled to contribution. The question, whenever it has arisen in our courts, has been between the owner of the goods thrown overboard and the underwriter. And the rule generally established seems to have been, that, for goods so laden, the underwriters are not responsible: *Ross v. Thwaite*, Park Ins. 26; *Backhouse v. Ripley*, Ib. But, in the case of *Da Costa v. Edmunds*, 4 Campb. 142, it was left to the jury to say whether there was a usage to carry on deck goods of the descrip-

tion of those thrown overboard; and, the jury having found such usage, the underwriters were held liable. The case now under consideration does not, indeed, arise between the same parties; but it appears to fall within the same principle of decision." Assuming the principles there laid down to be correct, let us see if there be anything in the circumstances of this case to protect the shipowner from liability. It cannot be denied that the goods in question were thrown overboard for the general safety of the adventure. *Primâ facie*, therefore, it is a case for general average. [WILLES, J.—"Wreck," in paragraph 7 of the case, means that which has been rendered useless or irrecoverable by a peril of the sea.] In Stevens on Average (edit. 1833), p. 67, the rule is thus stated,—“When a mast is carried away or sprung, and in consequence the sails and rigging which are hanging over the ship's side are obliged to be cut away, some foreign authorities say that the value, after being thus damaged, shall be made good by general contribution.^(a) But it should be remarked that the situation in which these articles are placed by the breaking of the mast, renders them of no value whatever.” *Baily, in support of his 7th proposition, which is relied on by the other side, refers to *Da Costa v. Edmunds*, 4 Camp. [*579 142, and the case of *The Neptune*, 1 W. Rob. Adm. R. 297. The former has no application at all to the subject, and the latter very little. His reasoning would equally apply where cargo was thrown overboard in consequence of its shifting. He goes on at p. 26,—“It is clear that a man cannot be called upon to pay damages for doing that which in principle he is justified in doing; for instance, when his life is endangered by another, he may even take the life of that other, if no other means exist of avoiding the danger, and cannot be called upon to make any compensation for the loss caused by his act. On the same principle, when another's property endangers his, and no other means exist of avoiding that danger, he may destroy it, and cannot be called upon to pay damages for his act. A fortiori, he may destroy it when it endangers his life also; which is the case at sea under such circumstances. When, therefore, property is destroyed because it endangers other property, the owner of the property destroyed is not entitled to compensation from the destroyer. The application of this principle will at first sight appear difficult: but, by adhering closely to the principle, the difficulty will vanish. For instance, when a vessel is making so much water forward that it is necessary to lighten her forward by throwing overboard a particular twenty bales of cotton stowed forward, it may at first sight appear, that, since the danger exists because the vessel is at that time too much by the head, and since she is not too much by the head when those twenty bales of cotton are removed, those twenty bales of cotton are the cause of the danger which renders their sacrifice necessary, and therefore the loss of them should not be allowed in general average. This, however, is not the *correct view of the case. The [*580 twenty bales of cotton were in the same place in the ship before she sprung a leak, when, in fact, she was in safety, and no danger existed, and therefore they cannot be the cause of danger. The real

(a) Referring to the Ordinance of Königsburg, art. xxv., and the Ordinance of Copenhagen, art. 1, § 10.

cause of the danger is the leak in the ship forward, which, by the jettison of the twenty bales of cotton is brought out of water; and thus the real cause of danger is prevented from acting on the vessel." If the article jettisoned is the cause of the danger, irrespective of a peril of the sea, then of course the owner has no claim for general average. This is exemplified by Mr. Baily, at p. 53. A jettison may become necessary, he says, "in order to get rid of goods or ship's stores, which, if retained on board, will cause a total loss of the ship and of the property in her, or of the lives of the crew, if no new circumstances arise to prevent it; as, in the case of heated hemp, which is liable to ignite. In such a case, principle 7 will exclude from general average the loss caused by such a jettison." [MONTAGUE SMITH, J.—Suppose guns cast loose by a storm, and thrown overboard necessarily,—are they excluded from general contribution?] It must be contended that they are, in order to sustain the plaintiffs' argument. In the case of hemp or any other article igniting from its own inherent heat, that would not be the subject of general average if thrown overboard. But, if the heating is caused by its becoming saturated with salt-water in consequence of a peril of the sea, there it would be. Upon the whole, it is submitted there is nothing to deprive the owner of this deck-loading of the right to participate in general average.

Cohen, in reply.—No authority has been cited on the part of the defendant to countervail the high reputation of Mr. Baily's book. It *581] is clear from the *protest that the goods in question were thrown overboard solely because they had broken adrift. It is, therefore, a case of particular average only. *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the court:—

In this case, which was argued in the course of the last term, before the Lord Chief Justice and my Brothers Byles and Montague Smith and myself, our judgment is for the defendant.

I may mention, lest it should appear that any confusion is likely to be introduced into the law by our decision, that we do not at all mean to throw doubt upon the propriety of the practice of average-staters in disallowing for that which can properly be called wreck. That appears to be a very general practice; and it is a practice which has found its way into the treatises upon the subject. The question is, what is wreck? In order to make jettison the subject of a general average contribution, two conditions must be fulfilled. First of all, there must be common danger. It must be a maritime peril, and it must be common to the whole adventure, which would exclude some of the cases which Mr. Cohen very ingeniously put, of a subject-matter that had within itself the elements of destruction which developed themselves during the storm: as, for instance, cotton which was brought on board in a damp state bursting out into a flame, and being thrown overboard. You cannot say there is a common danger, but a peculiar danger from the fault of the person putting it on board. And then, secondly, there must be a sacrifice, in the sense of intentional sacrifice. That is a second condition which must be fulfilled; *582] and that seems to exclude all those cases *in which the average-staters ought to refuse to allow a contribution upon the ground of wreck. Certainly, the reasoning is all consistent. All the writers

in this country and abroad appear to be agreed that the question is, whether there is common danger, and whether there is voluntary sacrifice. They are not all agreed, it must be admitted, upon the application in practice of these rules. But there is one case upon which our average-staters appear to be agreed, that is to say, if a mast were sprung, and a part of it were to go overboard with a quantity of spars and sails attached to it, hanging on by a stay which must give way in a minute or two, whilst in the meantime, by battering against the side of the vessel, it adds to the danger, and if the stay were cut to let it go at once, it would be very difficult to say that that was anything more than wreck. A lawyer could not lay down as a matter of pure law that all lumber cut loose is wreck. But what I say is, if it was virtually lost, if not recoverable, if the act of cutting the rope was only hastening the moment at which it would be lost, you would properly call that wreck, and you would not say it was general average. The reason given is, because you cannot keep it. There is no intentional sacrifice in cutting it away. You must lose it, and the losing it a minute or two sooner can make all the difference of its doing great injury or not; but you cannot help losing it. But, if, instead of cutting away what is virtually lost only, you cut away a portion of what is still on board and safe, except for the common danger; for instance, a mast or bowsprit, for the purpose of facilitating the getting rid of the wreck which is only encumbering the vessel,—if you do that, you ought to receive average in respect of the portion you so cut away, because that you do sacrifice. It may be it is exceedingly difficult *in some cases,—one can conceive [*583 it must be,—for average-staters consistently to apply the principle. But the principle appears to be clear, that, if the danger is common, and the thing is voluntarily sacrificed, it is contributed for rateably.

In this case, there was a deck-cargo. And the first observation naturally would arise upon its being a deck-cargo, and upon the exception with regard to deck-cargoes: but that is taken out of the case most effectually by reference to the charter-party. This is an action by the shipper of cargo against the shipowner; and the charter-party contemplates a deck-cargo. It is not suggested there is any statute to make a deck-cargo illegal; therefore it seems something more than custom to have deck-cargoes. I think, it was from Quebec; but it is not necessary to refer to any custom affecting the voyage, because, according to the contract between the parties, there was to be a deck-cargo. Then, immediately you find that the deck-cargo is within the contemplation of the parties, you must deal with it as if shipping a deck-cargo was lawful. When you have established that it is a deck-cargo lawfully there by the contract of the parties, it becomes subject to the rule of general average.

Now, dealing with that case, and taking one of the jettisons,—because I presume there was enough thrown overboard on each occasion to satisfy the plaintiff's claim, if he was liable to contribute,—the question is, whether there was any liability for any jettison. If so, the amount is agreed on in the case. Therefore, I take only one of the jettisons, and I take the one which Mr. Cohen himself most insisted upon, that is, most addressed himself to in his argument, and

which was most striking. The cargo appears to have broken away,—appears to have got loose on deck; it was not washed overboard; it *584] had not *become valueless; it was not spoiled with the water; and, if the weather had been fine, it could have been restowed, and it might have come on and been just as valuable except getting a little wetting with salt water. It was once restowed, or part of it, during the voyage; so that it clearly was not in a state of wreck, in the sense of having become lost property, which they could not recover, or make use of if they recovered it. Then there was this peculiarity about its being thrown overboard: it not only encumbered that part of the vessel, but it interfered with the pumps, which it was particularly necessary at that time to work. The persons on board the vessel naturally selected that part which was near the pumps, as first to throw overboard: and, no doubt, they would throw over the rest, if there was imminent danger of its getting loose, and taking the same course as the first part. But the same sort of question might arise in various forms as to cargo stowed in the hold. For instance, if there was an exceedingly heavy part of the cargo below, and the vessel was labouring very much,—when I say very heavy, I mean heavy in the sense of great specific gravity,—and, working upon a particular part of the vessel, it had strained the vessel, and so threatened to let in the water and sink her: if you took that and flung it overboard, in no other sense can it be said that the cargo in question, or that part of the cargo so thrown overboard, to be more precise, was exposed to danger different from the rest of the cargo, except in that circumstance, the circumstance that it was by reason of its weight and position the best thing to choose to throw overboard, and the thing which, in that sense, it was especially necessary to throw overboard for the benefit of the whole concern.

Was the jettison in this case voluntary? Was it to ward off a *585] common danger? It is only necessary to *look at the protest to find the answer. The danger was caused to all, both ship and cargo and crew, by the storm; and, to save the whole adventure from that storm, the timber was voluntarily thrown overboard; and it was not wreck. In short, the special danger caused to and by the timber was only a circumstance of the common peril to which the whole adventure was exposed.

For these reasons, we think that the set-off is good, and that our judgment ought to be for the defendant.

Judgment for the defendant.

Where it is the custom of trade to carry a deck-load, the jettison of goods thus stowed entitles the owner to claim contribution for general average loss: *Harris v. Moody*, 4 Bosw. (N. Y. 1859) 210.

The principle of general average, in spite of its simplicity, has given rise to so great a divergence in the practice

of different countries, that an International General Average Committee has constituted itself, and clamours for a special code to settle all the points that may arise in the development of the doctrine: 16 Law Mag. (1862) 322.

An International Congress to further this end was held in 1864, at York, England, in conjunction with the So-

cial Science Association. A report of the proceedings is given in 18 Law Mag. (1865) 322.

It is unnecessary to answer the arguments advanced in favour of a code, as this is already done in the volume last cited, page 204.

The enlightened advocates of a code would not, however, consider this an appropriate subject for codification, further than the statement made by legislative authority of the general principle: 2 Austin's Juris. 376. The application of the principle to cases within its scope should be left in either event to the determination of the courts.

The best justification of judiciary law is an illustration of the method in which legal subjects are constantly being reduced to order and symmetry by the intellect of the profession, where, as at the common law, the reason of the rule is the only thing sought for, and this, when discovered, is carried out in its logical sequence. The argument printed below, which gives a complete exposition of the doctrine, is a model of this process, and is a credit to its author, Hon. R. P. Spalding, at one period judge of the Supreme Court of Ohio, and at present member of Congress for the Cleveland district of that state.

United States District Court, Northern District of Illinois.—In Admiralty.

WILLIAM F. TUCKER v. PROPELLER BUCKEYE.

The propeller Buckeye, belonging to the Northern Transportation Company, was on her voyage from Ogdensburg to the port of Chicago, with a cargo of merchandise.

She had goods belonging to the libellant, which were taken on board with the express agreement that the shipper should take upon himself the ordinary risks of navigation, *with the risk of fire.*

The Buckeye, in the prosecution of her voyage, arrived at the port of Detroit, at about half past five o'clock in the morning, on the 28th day of July, 1861.

After being alongside the wharf, in Detroit, some twenty minutes, the second engineer, then on duty, discovered a slight smoke in his engine-room, which induced him to call on the fireman to ascertain if there was anything burning in the fire-hold. The fireman reported "all right."

The engineer, not being satisfied, then descended into the fire-hold and examined for himself, but could discover no fire. He returned to his engine, and, in a short space of time, took a lantern and repaired a second time to the fire-hold and made a critical examination, but with no better success; the cause of the smoke was a mystery.

He reascended the stairs and looked down the gangway, when he saw a portion of the main deck, directly above the boiler, and nineteen inches therefrom, on fire.

A space, apparently as large as a man's hand, and immediately over the forward end of the boiler, was in flames.

The engineer gave instant directions to the fireman to attach the steam-pump, or "poney," as he termed it, but the latter reported that the smoke had become so dense, he could not comply with the order.

The engineer descended for the purpose of working the force-pump, if possible, himself, but found the smoke so annoying that he was compelled to abandon the undertaking. The boiler was furnished with a "fire-cock," in the forward end, to let off steam and water into the hold. This was opened, ordinarily, by means of a rod running to the back end of the boiler, where it could be readily handled. In this instance, the rod had been grasped suddenly by the fireman, and, in his effort to turn the cock, *the lever was broken.*

for the repairs of the ship. Upon this ground it has been determined, *with some subtilty*, that when the cable was cut to save the ship, there was no contribution for the anchor lost, *the will not having extended thereto.*"

A beautiful example of an act in the nature of "a jettison," and giving an intelligible view of the elements that are required to be in combination to constitute a "general average loss," is presented by Emerigon:

"A vessel coming from Port-au-Prince to Marseilles, in February, 1782, at nine o'clock in the morning, descried two frigates on her quarter, bearing down for her, with the wind free, at two and a-half leagues distance. About mid-day another sail, that was taken for an enemy, appeared in the opposite direction; and shortly after a third was made out in chase.

"In the lapse of some hours, the captain was losing distance. At five o'clock in the evening, he prepared his ship's launch, placed in it a mast with a foresail, and attached to the top of the mast a *lantern*.

"As soon as it was quite dark, the lantern was lighted, and the boat put in the water, to go where the wind might carry her.

"The vessel then changed her course, sailing up the wind, close hauled. On the following morning there was no enemy to be seen, and she arrived safely at Marseilles.

"It is not to be doubted that the boat, *thus sacrificed for the common safety*, entered into *general average*:" Emerigon on Ins., by Meredith, 480.

My next proposition is, that, although damage resulting to the merchandise from the simple introduction of water, through the hatchway, to extinguish fire, will not and cannot, on principle, be declared a "general average loss," yet, if part of the ship be *intentionally* cut away and damaged,

in order to come at or extinguish an accidental fire, which threatens the destruction both of ship and cargo, there can be no doubt that such damage gives a claim to contribution:" 2 Arnould on Ins. 898-900.

If, by reason of cutting away the mast of a ship, or making a hole in her deck or sides or bottom, with a view to the common safety, water be introduced which damages the merchandise, this incidental damage will take the character of the "jettison," and acquire a claim to contribution.

"All the damage incidentally done to the ship or cargo, *in making a jettison*," says Mr. Phillips, "constitutes a part of the amount to be made good in general average:" 2 Phillips on Ins., section 1286.

And so Lord Tenterden says: "If, in the act of *jettison*, or in order to accomplish it, or in consequence of it, other goods in the ship are broken, damaged, or destroyed, the value of these also must be included in the general contribution:" Abbott on Shipping, 577, chap. 10, marginal page 476.

It was under this rule that the case of *Maggrath v. Church*, 1 N. Y. Term Rep. 196, was decided:

The vessel was on her beam ends, in which situation it became necessary for her preservation, and that of the cargo and crew, *to cut away the mainmast*.

In doing this, it splintered off, at and below "the partners," tearing away the piece of cloth called "the coat," which is nailed to the deck and mast for the purpose of keeping the water from running into the hold. In consequence of this, as the sea made a free passage over the vessel, a vast quantity of water continued to rush into the hold, till the stump of the mast was cut off and a new coat nailed over it. A quantity of corn, that formed a part of the cargo, was injured

by the water thus let into the hold of the vessel. It was deemed to be a "general average loss." The reason is given in the language of Mr. Justice Kent:

"We are to consider *the mast as sacrificed* for the general safety of the ship and cargo, and that in the act of sacrificing the mast, or as a *necessary consequence* of it, the corn was damaged, and this damage must be included in a general contribution."

The counsel for libellant cite for our consideration the case of *Nimicks et al. v. Holmes et al.*, 25 Penn. State Rep. 366, as a case "on all fours" with the one under consideration.

I was impressed with the remark of his Honour Judge Drummond, made during the trial, that this was "*a strong case.*"

It is strong enough, unquestionably, to break down all the learned distinctions that have separated general from particular average, for centuries, unless it can be brought within the spirit of the decision in *Maggrath v. Church*.

If we look at the facts in the case, we can be reconciled to the decision. Not so, if we look at the opinion as pronounced by the court; or, rather, we shall be forced to the conclusion that *an unsatisfactory opinion* has been given in a case rightly decided upon the evidence.

The facts were, that an accidental fire broke out in the hold of the steamer "Susquehanna," while she was lying at the wharf in Cincinnati, on the 4th day of May, 1852. All ordinary means were employed to extinguish the fire, but without success. The officers, believing that there was no other possible way of saving the boat and cargo, determined, *after consultation among themselves*, and with various other persons, upon the expedient of *scuttling her*.

They accordingly ran her out into the river, two miles from the wharf,

and there *sunk her* on a bar. A *portion of the deck was torn up*, and water was introduced from above, and by this means the fire was subdued and extinguished. The cargo was greatly injured by the water.

It was very justly determined by the Supreme Court in Pennsylvania, to be a case calling for contribution under the law of average. But the learned justice "overleaped the rule," when he said, "it makes no difference how the water is applied; by the aid of fire-engines on the land, or in the form of steam, or by *scuttling the vessel.*"

The true ground on which to place the decision was, that *the deck of the vessel was broken up*, in order to introduce the water. A jettison was in this way made, and once beginning with the contribution, you shall bring into the account all the damages sustained by the adventurers, whether attendant upon the act of jettison, or incidental thereto, if incurred in the use of means to save the adventure.

I notice, in passing, that I am more liberal with this case of *Nimicks v. Holmes* than Professor Parsons, of Cambridge. He declares it to have been a case of "particular average" only; "a case of partial loss, for which the insurers against fire would be liable:" vol. 1 Parsons on Maritime Law, p. 304, note 3.

I submit to the court that I am fully borne out in my criticisms upon the case in 25 Penn. State Rep. by the decision of the Superior Court in the City of New York, in *Lee v. Grinnell*, 5 Duer's Rep. 400.

On the night of the 25th December, 1853, the ship "Great Republic" lying at her dock in the city of New York, with nearly a full cargo on board, destined for Liverpool, took fire in her sails and rigging, from sparks blown upon them from a fire then raging in Front street. The forestay and the fore-topmast-stay were out to let down

the spars, which were on fire, and the fore-topmast, in falling, broke short off and fell down, endways, through three decks, and set fire to the cargo in the lower between-decks. The mainmast was next cut away, and in falling, carried with it the mizen and spanker masts, by the deck. After great exertions to put out the fire, by the firemen of the city, *the ship was scuttled* in three separate places, and soon sunk about ten feet and rested on the bottom. In the lower hold was a large quantity of corn, which was flooded *by the scuttling*. The grain, it was found, had swelled so as to break the knees and beams of the lower deck, and otherwise badly strain and injure the ship.

The court decided that such parts of the ship and cargo as were destroyed by *the scuttling* should be accounted for by general average contribution; the direct damage done to the grain in the lower hold, and the resulting damage to the ship's knees and timbers. "No damage," says Mr. Justice Hoffman, and please to mark his language (page 429), "No damage to the articles of the cargo which were between decks, and on fire, *arising from the water thrown in*, is to be contributed for. The fire is still to be considered as an accidental fire."

That is to say, so long as a fire is operated upon by men using water-buckets and fire engines for its extinguishment, in the usual way, the injury caused by the fire and the water together, can only be treated as the result of accident, and no contribution can be claimed. "It is an accidental fire." But so soon as you break a hole in the deck or in the bottom of the ship, to let in water upon the fire, the whole character of the damage is changed. A sacrifice is made, a part for the whole, and the whole loss must be brought into contribution.

The case of *Nelson v. Belmont* is found in 5 Duer's Rep. 810, and the

opinion is given by the same judge to whom I have last alluded.

It is evidently not so "well considered" a case as *Lee v. Grinnell*, and may seem, in some slight particulars, to vary from it.

They seem to have been both determined at the February term, 1856, but the later decision of the two is that of *Lee v. Grinnell*, which also contains the able and instructive remarks of Mr. Justice Duer on the nature of a "general average loss."

I do not attach much importance to the isolated saying of Mr. Benecke, that "the damages done by the water poured down the hatches of a vessel to extinguish a fire, is," as he conceives, "*of the nature of a general average.*"

It may approach very near to general average, and, under certain circumstances, come, as has been shown, within the rule; but I have learned enough of the law to know that "every tub must stand upon its own bottom."

The case of *Nelson v. Belmont* was subsequently taken up to the Court of Appeals, and there affirmed; but, though the expenses incurred in putting out the fire were included in the general average loss, this, being an incidental point, was not argued or referred to, and was merely involved in the decision. The proposition argued and determined was, that a separation of goods from the rest of the cargo, and from the whole adventure, destroyed the community of interest hitherto existing between the co-adventurers, and consequently took away the right of contribution for general average from the goods separated: 7 Smith (N. Y. 1860) 36. In *McAndrews v. Thatcher* the abandonment of the ship by the master was held to release the goods separated prior to that event from liability for general average loss: 3 Wall. (U. S. Sup. Ct. 1865) 348.

IRWIN v. SIR GEORGE GREY, Bart. *July 10.*

It is no ground of error in fact, that the whole of the special jurors struck were not summoned, or that the special jury panel was called over and a tales prayed before 10 A. M., the time for which the special jurors were summoned,—it not being competent to the party to aver anything that is inconsistent with the record.

THIS was error in fact brought by the plaintiff. The record was as follows:—

“Middlesex. George O'Malley Irwin, in person, sues The Right Hon. Sir George Grey, Bart., who has been summoned to answer the said George O'Malley Irwin, by virtue of a writ issued on the 19th day of June, 1862, out of Her Majesty's Court of Common Pleas, For that the plaintiff, having a claim for damages, to wit, to the amount of 100,000*l.*, against Her Majesty, heretofore, to wit, on the 24th day of April, 1861, duly and according to the Petitions of Right Act, 1860, presented a petition of right to Her Majesty, dated, to wit, the day and year aforesaid, and intituled in the Court of Queen's Bench, being a court in which the subject-matter of the said petition would have been cognisable if the same had been a matter in dispute between subject and subject, and stated in the margin the venue for the trial of the said petition: and the *said petition was addressed [*586 to Her Majesty in the form and to the effect in the schedule to the said act in that behalf annexed, and stated the Christian and surname and usual place of abode of the plaintiff, being the suppliant in the said petition, and of his attorney by whom the same was presented, and set forth with convenient certainty the facts entitling the plaintiff to relief, and was signed by the plaintiff's said attorney; which petition was duly left with the secretary of state for the home department, in order that the same might be submitted to Her Majesty, for Her Majesty's gracious consideration, and in order that Her Majesty, if she should think fit, might grant her fiat that right be done: And afterwards, before the said petition had been submitted to Her Majesty for Her Majesty's gracious consideration, the defendant became and was secretary of state for the home department, and had due notice of the premises and of the said petition: And thereupon, and whilst the defendant was such secretary, the plaintiff requested the defendant to bring, and as such secretary to submit the said petition to Her Majesty for Her Majesty's gracious consideration, in order that Her Majesty, if she should think fit, might grant her fiat that right be done: And the plaintiff did all things necessary on his part, and all things on his part necessary to happen and exist happened and existed, and all times necessary to elapse elapsed, to entitle the plaintiff to have the said petition submitted by the defendant to Her Majesty for Her Majesty's gracious consideration, in order that Her Majesty, if she should think fit, might grant Her fiat that right be done: And it became and was the duty of the defendant to submit the said petition to Her Majesty for Her Majesty's gracious consideration, in order that Her Majesty, if she should think fit, might grant Her fiat that right be done: Yet the defendant did not nor would submit the said petition *to Her Majesty for Her Majesty's [*587 gracious consideration, in order that Her Majesty, if she should think fit, might grant her fiat that right be done; but wholly neglected

and refused so to do, and therein wholly failed and made default: And the plaintiff avers that he is personally interested in the performance of the said duty, and that he has sustained and may sustain damage by the non-performance by the defendant of his said duty in that behalf; and that the performance of the said duty by the defendant has been demanded by the plaintiff of the defendant, and the defendant has refused and neglected to perform the same; and all conditions have been fulfilled, and all things have happened, and all times have elapsed necessary to entitle the plaintiff to the performance of the said duty by the defendant, and to claim a writ of mandamus in that behalf: And the plaintiff hereby claims a writ of mandamus commanding the defendant to submit his said petition to Her Majesty for Her Majesty's gracious consideration, in order that Her Majesty may, if she should think fit, endorse Her fiat that right be done: And the plaintiff claims 100,000*l.*"

Here followed a plea of not guilty, a joinder of issue, and a venire facias juratores.

"The 14th day of January, in the year
of our Lord 1863.

"Afterwards, on the said 14th day of January, 1863, come the plaintiff in person, and the defendant by his attorney aforesaid, and the Right Hon. Sir William Erle, Knight, Her Majesty's Chief Justice assigned to hold pleas in Her Majesty's Court of the Bench hath sent hither his record had before him, in these words,—Afterwards, on the 26th day of November, 1862, at Westminster Hall, in the county of Middlesex, before the Rt. Hon. Sir William Erle, Knight, Her Majesty's Chief Justice assigned to hold pleas in Her Majesty's Court of the Bench, come the within-named plaintiff *in person, *588] and the within-named defendant by his attorney within-named; and a jury of the said county, being summoned, also come, who, being sworn to try the matters in question between the said parties, upon their oath say that he the defendant is not guilty.

"Therefore it is considered that the plaintiff take nothing by his said writ, and that the defendant do go thereof without day, &c., and that the defendant do recover against the plaintiff 162*l.* 4*s.* for his costs of defence.

"The 15th day of January, 1863.

"Afterwards, on the said 15th day of January, 1863, the plaintiff in person delivered to one of the Masters of this court a memorandum in writing, according to the statute in that behalf, alleging that there was error in fact in the record and proceedings aforesaid, together with an affidavit of the matter of fact in which the said error consisted; and the said Master, according to the said statute, filed the said memorandum and affidavit.

"The 22d day of January, 1863.

"Afterwards, on the said 22d day of January, 1863, comes here the said George O'Malley Irwin, the plaintiff in person, and says that in the record and proceedings aforesaid, and also in the giving the judgment aforesaid, there is manifest error, in this, to wit, that, after the issue was joined in this cause, and before the trial of the said issue, to wit, on the 25th of October, 1862, it was duly ordered by the rule of this Honourable court dated Trinity Term, in the 26th

year of the reign of Queen Victoria, Saturday, the 25th October last, on the motion of Mr. Welsby, for the above-named defendant, 'That, at the expense of the defendant, 48 special jurors should be nominated out of the juror's book and special jurors' list for the county of Middlesex, and be reduced before the under-sheriff of the said county, of whom 12 should be struck *out by each party, and the remaining twenty-four jurors should be placed on a panel for [*589 the trial of the said cause, pursuant to the statute 6 G. 4, c. 50, and the Common Law Procedure Act, 1852; and that the sheriff of the said county do cause the said 24 jurors to be summoned to attend at the said trial, and that they do attend accordingly.' And the plaintiff further says that the following persons were, in pursuance of the said rule and the said statute in such case made and provided, duly struck as the jurors to be returned for the trial of the said issue,—Robert Gardner, 33 Gloucester Gardens, merchant, George Thomas Stroud, 6 Shepperton Street, Islington, merchant, John Carter, 25 Durham Terrace, merchant, William Sparks, 16 Crescent Road, merchant, Peter Adams, 5 York Terrace, Islington, merchant, Edwin Abbott, 30 Dorchester Place, Marylebone, Esq., Hector Maclean Hay, 87 Howland Street, Esq., James Walker, 7 Park Village West, merchant, Henry Thompson, 12 St. John's Wood Park, merchant, George Blaylock, 20 Stock Orchard Crescent, merchant, George Poole, 13 Clarendon Villas, Islington, merchant, George Stapley, 13 Devonshire Road, merchant, Thomas Jones Gibb, 54 Porchester Terrace, merchant, James Bryant, Avenue Road Gardens, merchant, Frederick Appleford, 14 Aberdeen Park, merchant, Horatio Bebb, 18 Gloucester Place, Marylebone, Esq., William Beachcroft, 7 Devonshire Terrace, Esq., William Thackery, 18 Amptill Square, merchant, James German, 63 Inverness Terrace, Esq., John Phillip Judd, 49 Sussex Gardens, merchant, Thomas Goodson, Albany, Esq., Sir Richard Frederick, 52 Berkeley Square, Bart., Richard Bell, 23 Northampton Square, merchant, Thomas Foster, 4 Cleveland Terrace, Esq.; and that the following persons, although so struck, were not summoned to attend as jurors on the trial of the said issue,—George Thomas Stroud, 6 Shepperton Street, Islington, merchant, Hector Maclean Hay, 37 *Howland Street, Esq., Peter Adams, 7 York Terrace, [*590 Islington, merchant, George Poole, 13 Clarendon Villas, Islington, merchant, George Stepley, 13 Devonshire Road, merchant, Thomas Jones Gibb, 54 Porchester Terrace, merchant, James Bryant, Avenue Road Gardens, merchant, John Phillip Judd, 49 Sussex Gardens, merchant: That, *by reason of the said persons not having been summoned to attend the court on the trial of the said issue, and the names of the aforesaid special jurors not having been called over in court at or after ten o'clock, which was the hour named in the said summons for the said jury to attend the court on the trial of the said issue, twelve of the said special jurors did not attend to try the said issue, but that only ten of the said special jurors attended and were sworn on the said jury: and that a tales was thereupon prayed on behalf of the above-named defendant, and divers, to wit, two talesmen were accordingly sworn on the said jury; And this the said plaintiff is ready to verify, wherefore he prays that the judgment aforesaid may be revoked, annulled, and altogether held for naught, and that the plaintiff may be restored to all things which he hath lost by occasion thereof."*

"The 4th day of February, 1863.

"The defendant, Sir George Grey, Bart., by the said H. T. Raven, his attorney, says that there is no error either in the record and proceedings aforesaid, or in the giving the judgment aforesaid."

*591] The plaintiff in error, in person. (a)—The first ground *of complaint is, that all the special jurors who were struck ought to have been summoned. This is required by the express words of the Jury Act, 6 G. 4, c. 50, ss. 25, 26. The second is, that the jury struck ought to have been the jury returned for the trial of the issue. This is required by the enactment contained in s. 30. The third is, that a tales can only be prayed when the jury are in *default* by not appearing, which they are not if they have not all been summoned. This is required by s. 37, which enacts, that, where a full jury shall not appear, &c., or where, after appearance of a full jury, by challenge of any of the parties, the jury is likely to remain untaken for default of jurors, every such court, on request made by the parties in any action or suit, shall command the sheriff to name and appoint so many of such other able men of the county then present as shall make up a full jury; and the sheriff shall, at such command of the court, return such men duly qualified as shall be present or can be found to serve on such jury, and shall add and annex their names to the former panel; and the court shall proceed to the trial of every such issue with those jurors who were before impannelled, together with the talesmen so newly added and annexed, as if all the said jurors had been returned upon the writ or precept awarded to try the issue. A further objection is, that the names of the special jurors were not called over at or after 10 o'clock, the hour named in the summons. If the ordinary practice in this respect had been adhered to, peradventure it would have been unnecessary to pray a tales. The whole *592] subject is *elaborately discussed in the opinions delivered by the judges to the House of Lords in the case of *The Queen v. O'Connell*, 11 Clark & Fin. 153. Lord Denman, at p. 362, says: "There is one thing too remarkable to be overlooked. In that short passage in Lord Coke, which contains the whole of the learning upon this subject (Co. Litt. 156), he cites a case from the Year Books, which is twice reported, once in the 17th of E. 3, and once, I believe, in the 20th of E. 3. The sheriff returned a list, which the bailiff of the franchise ought to have returned; that was held to be wrong *primâ facie*, because it deprived the party of his challenge against the bailiff individually. But then it was argued, 'Oh, but there are good names enough returned by the sheriff to insure the party a fair trial;' exactly the argument which appears to have succeeded in Dublin. But the

(a) The points marked for argument on the part of the plaintiff in error were as follows:—

"1. That all the special jurors who were struck ought to have been summoned: 6 G. 4, c. 50, s. 25.

"2. That the special jury struck ought to have been the jury returned for the trial of the issue in this cause: s. 30:

"3. That a tales can only be prayed when the jury are in default by not appearing, which they are not if they have not all been summoned: s. 37:

"4. That the issue not having been tried by a duly constituted jury, the verdict is not binding, is a nullity, and the judgment founded on it is erroneous:

"5. That the names of the special jurors were not called over at or after 10 o'clock, the hour named in the summons."

court held, in the time of Edward 3, that, as the array was one entire indivisible thing, one error would vitiate the whole; and the whole was accordingly set aside. In that very case, the sheriff was charged with unindifferency: the question of his unindifferency was tried: he was acquitted upon that charge; and yet the fact of his having done, though not with any corrupt or partial intention, that which gave a different jury, was deemed a default sufficient to set aside the whole proceeding." That plainly shows that any irregularity in the mode of procuring the attendance of a jury renders the whole proceeding erroneous. Lord Denman, in the same case, at p. 353, quotes the opinion of Coleridge, J., to the following effect: "It seems to me that all questions touching the formation of juries must be examined by the judges with very critical eyes." In *Haldane v. Beauclerk*, 3 Exch. 658, 6 D. & L. 642, where the defendant had obtained a rule for a special jury, which was nominated and struck, but no special jury process issued, and the *cause was tried by a common jury as undefended, the court set aside the trial, with costs. [WILLES, [*593 J.—That case is disposed of by the 113th section of the Common Law Procedure Act, 1852.] In *Hague v. Hall*, 5 M. & G. 693 (E. C. L. R. vol. 44), 6 Scott N. R. 705, where a cause was entered as a *special jury* cause, but was taken in the defendant's absence, and tried by a *common jury*, as an undefended cause, the court set aside the trial and verdict, with costs. "The words," says Tindal, C. J., "of the Jury Act (6 G. 4, c. 50, s. 30) are very strong,—that 'every jury so struck shall be the jury returned for the trial of such issue.' The trial was clearly irregular." In *Newman v. Graham*, 11 C. B. 153 (E. C. L. R. vol. 73), it was held, that, where the defendant has duly obtained a rule for a special jury, and the jury has been struck and reduced, it is not competent to the court to direct that the cause be tried by a common jury, on the defendant's failure to summon a special jury. "The statute," says Cresswell, J., "is imperative, that the jury struck shall be the jury to try the issue." And Jervis, C. J., adds: "It is not competent to any court to repeal a positive enactment of the legislature. The practice on the subject is quite settled." In *Montague v. Smith*, 21 Law J., Q. B. 73, the Court of Queen's Bench held themselves to be bound by the decision of the Court of Exchequer in *Haldane v. Beauclerk*. Lord Denman there says: "After great consideration, looking to the interpretation put upon the Jury Act by the Court of Exchequer, I will express no other opinion in this case, except that I feel bound by *Haldane v. Beauclerk*. In points of practice, it is extremely desirable that there should be an uniformity of proceeding in all the courts." [WILLES, J.—The simple question of fact here is, whether the circumstance of all the special jurors not having been summoned, and of the names having been called over before 10 o'clock, is ground for error in fact.]

**The Solicitor-General* (with whom were *The Attorney-General*, [*594 *T. Jones*, and *Hannen*), *contra*.(a)—It is not competent to the

(a) The points marked for argument on the part of the defendant in error were as follows:—

"1. That the matters alleged by the plaintiff as grounds of error in fact do not in point of law, nor do any of them, amount to error in fact:

"2. That the allegation in the assignment of errors, that, by reason of the matters therein alleged, twelve special jurors did not attend and were not sworn to try the issue, does not show

plaintiff to set up as ground of error that the whole of the special jurors struck were not summoned, because that would be to contradict the record: and, if there was any irregularity in the mode of summoning or calling them, the plaintiff by his appearance waived it. The authorities upon this subject are very numerous. In *Bac. Abr. Error (K)*, 3, it is said: "It seems a general rule that nothing can be assigned for error that contradicts the record; for, the records of the courts of justice, being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore, though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit of it. Hence it is, that, in a writ of error to reverse a fine, the plaintiff cannot assign *595] that the *conusor died before the teste of the dedimus, because that contradicts the record of the conusance taken by the commissioners, which evidently shows that the conusor was then alive, because they took his conusance after they were armed with the commission and the dedimus issued. If a writ of error be brought upon a judgment in an inferior court, and the record certified of a court held before the mayor, bailiffs, and burgesses of A. by custom, it cannot be assigned for error that there is no such custom, for this is contrary to the record, and even what the writ of error itself supposes, viz. that they have a court. In a writ of error upon a judgment in the palace court held 'coram Jacobo Duce Ormond,' it cannot be assigned for error that the duke was not there, because that is contrary to the record, though in fact the court was held before his deputy, according to the patent. If A. B. is sworn upon the principal panel, and another of the same name is sworn upon the tales, it shall not be assigned for error that the A. B. first sworn and A. B. the talesman were one and the same person, so as to make it a trial by eleven jurors only; for, this is contrary to the record, which says that they who were sworn on the tales were 'alii de circumstantibus;' he could not be *idem* consistently with the record, which says that he was *alius*; and therefore such an averment, contrary to the record, shall not be admitted. So, it shall not be assigned for error that A. B., who was sworn as a juror returned upon the principal panel, was never returned by the sheriff; for, after the joinder in issue, the record goes on to the award of a venire facias returnable at such a day, 'ad quem diem,' it says, 'jurata inter partes præd. ponitur in respectu' till the next term, nisi prius the justices come, &c.; at which time they come, et juratores unde infra sit mentio exacti unus eorum (that is, one of *596] those returned by the sheriff) *viz. A. B., venit et in juratam illam juratus existit;' so that the record expressly says that the A. B. who was sworn was one of them who was returned by the sheriff, and therefore the error assigned is contrary to the record." In *Helbut v. Held*, 2 *Ld. Raym.* 1414, *Stra.* 684, *Held* brought an action of assault

any ground of error, and is bad, as contradicting the record, which states that a jury of the county of Middlesex, being summoned, came and were sworn to try the matters in question between the parties:

"3. That, if the matters alleged in the assignment of errors be true, the same amounted at most to an irregularity, in respect of which the plaintiff ought to have made his objection before the jury were sworn; and that the plaintiff, having submitted his case to a jury so summoned and sworn as in the said assignment of errors mentioned, cannot be heard to allege that the mode of summoning or swearing the said jury, or any of them, is a ground of error."

and battery in the Common Pleas against Helbut, and, upon his pleading the general issue, verdict and judgment was given for Held; upon which Helbut brought this writ of error in the King's Bench, and assigned for error, *quod per recordum prædictum apparet quod prædictus Edwardus Richier* (mentioned in the *postea* to be the only jurymen who appeared on the principal panel) *jurator nominatus in panello prædicto de habendo corpora juratorum summonitorum inter prædictum Hugonem et Isaacum annexo exactus venit*, and was sworn on the jury, and gave his verdict *simul cum juratoribus prædictis de novo appositis*; whereas, by the record of the *venire facias*, it appeared that the said Edward Richier was not returned nor impanelled by the sheriff of London in the panel to the said writ of *venire facias* annexed, and returned as by law he ought, &c. For the plaintiff in error, it was urged that the verdict, being given by a person not named in the panel upon the *venire*, was ill, and the judgment thereupon given was erroneous. For the defendant in error, it was insisted, and so adjudged, by the court, that this was not assignable for error, it being against the record. At the end of that case is a note of a case of *Plommer v. Webb*, M. 3 G. 2, B. R., as follows,—“Debt on bond; non est factum pleaded; verdict and judgment for the plaintiff in the Common Pleas: on error on this judgment, error was assigned that Webb died before the day of *nisi prius*; and held it was not assignable for error, because the record mentioned that he appeared that day. Judgment was affirmed.” In **Molins v. Werby*, 1 Lev. 76, it is said that “error that the judge was not in court, [*597] is against the record, and not assignable.” In *The King v. Carlile*, 2 B. & Ad. 362 (E. C. L. R. vol. 22), a return to a writ of error directed to the commission of oyer and terminer of the city of London, set out the record of an indictment found against the defendant, before the lord mayor and others; and stated that he was tried upon the said indictment by a jury of the country at the next session holden before the lord mayor, several of the judges, aldermen, recorder, and others, assigned by certain letters-patent under the great seal directed to them, *or any two or more of them*, to inquire of certain offences; that he was by the verdict of such jury found guilty; and that thereupon judgment was given *by the court* against him. Upon this return the defendant assigned as error in law that the judgment was insufficient and that it should have been for the defendant, and as error in fact (amongst others), that, when the jury gave their verdict, there was but one of the justices named in the commission present in court. The King's coroner and attorney answered “*in nullo est erratum*,” and prayed that the judgment might be affirmed: and it was held, that, as it appeared by the record that the verdict was given at a session holden before *several* of the commissioners and justices, the plaintiff in error could not be allowed to aver, in contradiction to the record, that only *one* of the justices was present when the jury gave their verdict; and that the answer “*in nullo est erratum*,” is no admission of the fact assigned for error, unless it could be lawfully assigned, and is well assigned in point of form. Lord Tenterden, in delivering the judgment of the court, there said: “We think ourselves bound by the authorities in the books, which are numerous and consistent, to decide that the plaintiff in error cannot be received

*598] to make the averment contrary to the *record." [BYLES, J.—Do the court say what ought to be done in such a case?] No. In *Ex parte Newton*, 24 Law J., C. P. 148, 16 C. B. 97 (E. C. L. R. vol. 81), upon an indictment charging felony committed within the jurisdiction of the Central Criminal Court, the prisoner was convicted and sentenced to imprisonment. After sentence, application was made to the Court of Common Pleas for a writ of habeas corpus to bring up the prisoner to be discharged, upon an affidavit alleging that the offence was committed out of the jurisdiction of the Central Criminal Court: and it was held that the record was an estoppel, and the writ was refused. The cases upon the subject are uniform. [WILLES, J.—The plaintiff has not cited any authority for a writ of error: all the cases he relies on are cases of motion.] A motion for a new trial was made in this case, and refused. Nothing could be more inconvenient and obstructive of the course of justice, than to hold that the mere neglect of the officer to summon one of the special jurymen, renders the whole proceeding nugatory and void. [WILLES, J.—How does it appear that the jury were called over and sworn before 10 o'clock?] Only by the plaintiff's affidavit. The record, however, alleges all that is necessary to show that the proceedings were regular: the court will assume *omnia rite esse acta*. The plaintiff was present; and, if he had anything to object to, he ought to have urged it at the time. [BYLES, J., referred to *Holt v. Meddowcroft*, 4 M. & Selw. 467.] There the defendant protested. Here the plaintiff did not. Besides, it was a proceeding by motion. There are many authorities to show that even matter of error may be cured by appearance: see *Bac. Abr. Error* (K) 5. "A man shall never assign that for error which he might have pleaded in abatement, for it shall be accounted his folly to neglect the time of taking that exception.

*599] As, if a feme *covert brings an action in her own name *per attornatum*, and the defendant plead in bar to the action, he shall never afterwards assign the coverture for error. So, if a feme sole brings trespass, and recovers, and a writ of inquiry of damages is awarded, and before the return thereof the plaintiff takes husband, and after the writ is returned, and judgment given thereupon, without any exceptions taken by the defendant, he shall not have advantage of this in a writ of error, because the writ was only abateable by plea." [WILLES, J., referred to *Andrews v. Elliott*, 5 Ellis & B. 502 (E. C. L. R. vol. 85), 6 Ellis & B. 338 (E. C. L. R. vol. 88).] There, Mr. Bramwell, then a Queen's counsel, was in the commission of *nisi prius*, and could have tried the case with a jury; and the statute 17 & 18 Vict. c. 125, s. 1, under certain limited conditions, gave him power to try by himself. The Court of Queen's Bench and the Exchequer Chamber thought that the plaintiff, by his consent to the case being tried without a jury, was estopped from denying that the statutable conditions had been fulfilled. Here, the plaintiff does not allege that all the facts did not come to his knowledge at the time.

The Plaintiff, in reply.—The authorities already cited,—*Newman v. Graham*, 11 C. B. 153 (E. C. L. R. vol. 73), *Haldane v. Beauclerk*, 3 Exch. 658, *Montague v. Smith*, 21 Law J., Q. B. 73, *Hague v. Hall*, 5 M. & G. 693 (E. C. L. R. vol. 44), 6 Scott N. R. 705, and *The Queen v. O'Connell*, 11 Clark & Fin. 361,—clearly show that the proceedings

here are erroneous, and that this is the proper way, and indeed the only way, of taking advantage of the irregularity. As to the suggestion of waiver, it is enough to say that a man cannot waive an irregularity of which he has no knowledge: 2 Chitt. Archb. 11th edit. 1461: and here the plaintiff could not at the time know that the jurors had not all been summoned. It is true, a jury *came; but not a proper one. [BYLES, J.—You knew that the whole panel [*600 did not attend. That which you did not know, was, that some of them were not summoned.] Exactly so. [WILLES, J.—In Doe d. Lord Ashburnham v. Michael, 16 Q. B. 820 (E. C. L. R. vol. 71), on the trial of a special jury cause, when the names of the special jurymen, who had retired to consider their verdict, were called over on their return into court, it was discovered that a person on the impannelling of the jury summoned as a special jurymen on another cause had answered by mistake to the name of a jurymen summoned for the cause on trial, and had served in his stead. The defendant then objected to take the verdict of the jury so impannelled: the plaintiff insisted on taking it: and the jury gave a verdict for the plaintiff. It was held that this was a mis-trial, as the objection was taken before verdict, and that there must be a venire de novo. But that was upon motion.] *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the court:—

This is error in fact upon a judgment for the defendant founded upon a verdict in his favour pronounced by a jury of the county of Middlesex upon a trial before the Lord Chief Justice. The argument took place on the 19th and 20th of June, before my Brother Byles and myself, when we took time to consider.

The assignment of errors states in effect that the defendant obtained a rule for a special jury, whereupon twenty-four jurymen were duly struck pursuant to the statute as the jurors to be returned for the trial of the said issue; that eight of the special jury so struck were not summoned to attend as jurors on the trial; *that, by reason [*601 of those persons not having been summoned, and the names of the special jurors not having been called over in court at or after 10 o'clock, the hour named in their summons, only ten of the special jurors appeared and were sworn on the said jury.

The precise objections upon which this assignment of errors is founded are, therefore,—first, that eight of the special jury were in fact unsummoned,—secondly, that the names of the special jurors were not called over at or after 10 o'clock,—and, lastly, that, as a consequence, there were only ten special jurors on the jury, upon which therefore there must have been two talesmen.

The plaintiff in error relied upon the Jury Act, 6 G. 4, c. 50, s. 30, by which it is enacted, that, when a special jury is struck, “the jury so struck shall be the jury returned for the trial of such issue.” And he showed much industry in citing numerous cases in which a trial by a common jury after a special jury had been struck was set aside by the court, upon motion,—amongst which are, *Holt v. Meddowcroft*, 4 M. & Selw. 467, *Hague v. Hale*, 5 M. & G. 693 (E. C. L. R. vol. 44), 6 Scott, N. R. 705, *Newman v. Graham*, 11 C. B. 153 (E. C. L. R. vol. 73), and *Montague v. Smith*, 21 Law J., Q. B. 73: and he placed much reliance upon the opinion expressed by Lord Denman in *O’Connell’s*

received the same respectively, in case the said last-mentioned act had not been made.

10. The 8th section of the said act conferred powers of appointing new trustees of the said act.

11. The said George Rice Lord Dynevor has been duly appointed and is now the sole surviving trustee of the said act, and the lands for the recovery of which this action is brought are now vested in him as such trustee as aforesaid, but subject to the leases hereinafter mentioned, or one of them, in case the same are or is valid and subsisting.

12. The lands, for the recovery of which this action is brought, have not, nor has any part thereof, ever been sold under the provisions of the said act.

13. By indenture of lease, made the 2d of November, 1830 (which for the purposes of this case is admitted to have been executed and perfected in conformity with the powers contained in the act of 1720, save in so far as herein appears to the contrary), the Right Honourable John Earl of Shrewsbury, being then heir male of the body of the second son of George Talbot (whose first son had died without leaving any issue male), son of Gilbert Talbot in the said Shrewsbury Estate Act, 1720, mentioned, demised eighty acres in the said township of Oxton (part of which are the lands sought to be recovered in this action) to Samuel Ackerley, for ninety-nine years from the said 2d of November, 1830, if three persons in the said indenture mentioned should so long live, at the yearly rent of 20*l.* for the first ten years, and 30*l.* for every year after the first ten; the said Samuel Ackerley cove-
*613] nanting to lay out 250*l.* in building on the said land within five years.

14. By indenture of lease of the 2d of February, 1838 (executed and perfected in like manner), the said John Earl of Shrewsbury, in consideration of the surrender of the said lease of the 2d of November, 1830, demised seventy-eight acres in the township of Oxton (which are the lands sought to be recovered in this action) to Joseph Robinson Pim, for ninety-nine years, if three persons named in the said lease, or either of them, should so long live, at the yearly rent of 30*l.*, the said Pim covenanting to lay out 1000*l.* in building on the said land within five years.

15. One of the three persons named in the last-mentioned lease, upon whose deaths the same is determinable, is still living.

16. On the 9th of November, 1852, the said John Earl of Shrewsbury died without leaving any male issue, and thereupon Bertram Arthur, the seventeenth and last Earl of Shrewsbury, succeeded to the title and estates annexed to it. He died a bachelor on the 10th of August, 1856, and thereupon the issue male of George Talbot, on whom the estates were by the settlement of the Duke of Shrewsbury and by the said act of 1720 settled in tail male, became extinct; and thereupon (upon failure and in default of issue male of the said Gilbert Earl of Shrewsbury, of the said George Talbot, and of the said John Talbot, in the said Shrewsbury Estate Act, 1720, named) the present Earl of Shrewsbury became and now is the person, being issue male of the body of the said John, first Earl of Shrewsbury, to whom the said title, honour, and dignity of Earl of Shrewsbury did, after the decease as aforesaid of the said Gilbert Earl of Shrewsbury, George

Talbot, and John Talbot, without issue *male of their respective bodies, by virtue of the said letters-patent of creation of the said earldom, descend and come. [*614]

17. Copies of the said Shrewsbury Estate Acts 1720 and 1803, respectively, and copies of the leases of the 2d of November, 1830, and of the 2d of February, 1838, respectively, accompanied and were to be taken as part of this case.

The question for the opinion of the court was,—whether John Earl of Shrewsbury had power to demise by the said indenture of lease of the 2d of February, 1838, the lands by the Shrewsbury Estate Act, 1803, vested in the trustees for sale, so as to bind the plaintiffs.

If the court should be of opinion in the negative, the plaintiffs, or such one of them as the court should direct, were or was to have judgment to recover the lands described in the writ, with costs. If the court should be of opinion in the affirmative, the defendants were to have judgment in the said action, with costs.

Manisty, Q. C. (with whom was *Hannen*), for the plaintiffs.(a)—The question to be determined in this *case, is, whether John the then Earl of Shrewsbury had in February, 1838, power, by [*615] virtue of the 10th section of the Shrewsbury Estate Act of 1720 (6 G. 1, c. 29), to grant a lease of lands which were vested in trustees to sell by an act of 1803, 43 G. 3, c. 40. The state of the title to the Shrewsbury estates at the time of the passing of the act of 1720 is fully recited in the preamble to the first section. There had been a settlement by the Duke of Shrewsbury by indentures of the 30th and 31st of October, 1700, and a will of the Duke of the 19th of July, 1712: then the lands came to Gilbert Earl of Shrewsbury, who made a settlement on the marriage of his younger brother, George Talbot, dated the 3d and 4th of March, 1718, which last-mentioned settlement was ratified and confirmed by the act of 1720. All that is now material to be stated, is, that, under that settlement and act of parliament, George Talbot took an estate for life, with remainder to the heirs male of his body in tail. The 2d section of the act limited the estates (subject to an exception and to certain charges) to Gilbert Earl of Shrewsbury for life, remainder to his first and other sons, remainder to the issue of the first earl to whom the earldom should descend. The 4th section contains a power for George Talbot to charge the lands (except those in the county of Oxford) to raise portions for daughters. The 6th and 7th sections gave further powers of charging. The 8th section gave rise to the great contest between the present Earl of Shrewsbury and the executors of Bertram Arthur the seventeenth earl, reported 6 C. B. N. S. 1 (E. C. L. R. vol. 95). The

(a) The points marked for argument on the part of the plaintiffs were as follows:—

“1. That neither of the acts mentioned in the case conferred a power to make the lease in question:

“2. That, by the act of 1803, the lands thereby vested in trustees for sale were entirely taken out of settlement, and the previously existing power to lease them was put an end to:

“3. That the continuance of the previously existing power to lease the lands vested in trustees for sale would be inconsistent with the trust for sale:

“4. That the 1st section of the act of 1803 by implication declares that the only leases which were to be valid were such as had been made *before* the passing of that act, and therefore that any lease subsequently made should be void:

“5. That there was not, after the passing of the act of 1803, any power to lease any of the lands which by it were vested in trustees for sale.”

9th section gave the successive tenants for life a power of jointuring.

*616] And the 10th section, which *gives rise to the present contest, is as follows:—"Provided always, and be it further enacted and declared, that it shall and may be lawful to and for the first and all and every other son and sons of the body of the said George Talbot, son of the said Gilbert Talbot, lawfully to be begotten, and the several and respective heirs male of the body or bodies of all and every such son and sons lawfully issuing, and to and for the first and all and every other son and sons of the body of the said John Talbot of Longford lawfully to be begotten, and the several and respective heirs male of the body or bodies of all and every such son and sons lawfully issuing, and also to and for all and every other person and persons to whom the said manors, lands, tenements, hereditaments, and premises are limited by this present act of parliament, successively, as aforesaid, by any deed or deeds, writing or writings, by them respectively to be signed in the presence of two or more credible witnesses, to demise or lease all or any part or parts of the said manors, lands, tenements, hereditaments, and premises whereof the person making such lease shall be actually possessed, except the capital messuage, outhouses, gardens, and park of Heathropp, in the county of Oxon, to any person or persons, in possession, and not in reversion, for the term of three lives or twenty-one years, or for any number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there be reserved and made payable yearly during the continuance thereof *the usual and accustomed yearly rents*, boones, and services for the same, and so as in every such lease there be contained a condition of re-entry for non-payment of the said rent and rents thereby to be reserved, and so as the lessee and lessees to whom such lease and leases shall be made do seal and execute counterparts of such lease *and leases." It was under that section *617] that John Earl of Shrewsbury, one of the heirs male of George Talbot, professed to grant the lease in question. If he had power so to do, it is conceded that the lease is in all other respects in conformity with the act. But, in the year 1803, an act was passed (43 G. 3, c. 40), by virtue of which the plaintiffs contend that the whole township of Oxton, including the 78 acres demised by the lease in question, was amongst other lands taken out of settlement, and vested in trustees, freed from the uses, trusts, and powers, whether of jointuring, charging, or leasing, contained in the act of 1720, and from all the limitations contained in the former settlements, in trust to sell, and to re-invest the purchase-money in other lands to be settled to the same uses, &c. This act of 1803 recites the ancient settlements and the act of 6 G. 1, c. 29: it then recites, that "whereas the Right Hon. Charles now Earl of Shrewsbury is the heir male of the body of the said George Talbot, deceased, on the body of the said Mary, his wife, his late grandfather and grandmother, and is entitled to an estate in tail-male in possession of the said settled manors and estates, subject to the restriction imposed by the said recited act: and whereas the said Charles Earl of Shrewsbury hath not any issue of his body, and, on his decease without issue male, the honor, title, and dignity of Earl of Shrewsbury, and the said manors, lands, tenements, and hereditaments, will, under the limitations in the said indenture of settle-

ment of the 4th of March, 1718, and the said act of parliament, descend and accrue to the Hon. John Joseph Talbot, his brother, and his issue male: and whereas certain parts of the estates settled and limited by the said settlement of the 4th of March, 1718, and the said act of parliament, consist of undivided parts or shares, and others are dispersed in many parcels, and lie in a *number of parishes [*618 and places very distant from each other, in the several counties of Salop, Chester, Berks, Wilts, and Oxford, and are remote and at a great distance from the principal estates of the said Charles Earl of Shrewsbury situate in the counties of Oxford, Worcester, Stafford, and Chester, and from the family seat of Heathropp, which is situated in the parish of Heathropp, in the said county of Oxford, and the management and receipt of the rents of the remote parts of the said estates is, by reason of such their situation, attended with additional expense and much inconvenience; and, as most parts of the said estates in the said counties of Salop, Chester, Berks, Wilts, and Oxford would sell to great advantage, it therefore would be greatly for the benefit of the said earl and those entitled in remainder after him under the limitations in the said settlement and act of parliament, if all the said estates situated in the said counties of Salop, Chester, Berks, and Wilts, and certain detached parts of the said estates in the said county of Oxford, were sold: and whereas it is desirable to purchase and acquire other estates in the said counties of Oxford, Worcester, Stafford, and Chester, which lie more convenient and advantageous to be enjoyed with the bulk of the said earl's estates in those counties, and the said Earl of Shrewsbury and the said John Joseph Talbot are well satisfied that it would be greatly for the benefit and advantage of themselves and such other persons as may become entitled to the bulk of the said settled estates by virtue of the limitations contained in the said settlement and act of parliament, that power should be given to sell the said estates in the said counties of Salop, Chester, Berks, Wilts, and Oxford, and to lay out the moneys arising by the sale thereof in the purchase of other estates lying within the said counties of Oxford, Worcester, *Stafford, and Chester, or some of them, to be settled as nearly [*619 as may be to the same uses as by the said settlement and act of parliament are directed and limited of and concerning the said estates thereby settled: but, although such sale and disposition will be for the benefit and advantage of the said Charles Earl of Shrewsbury, John Joseph Talbot, and their issue male, and the several other persons in remainder, yet the said earl is, by reason of the restrictive clause (s. 8) contained in the said act of parliament, although tenant-in-tail in possession of the said estates, deprived of the powers by law incident to an estate-tail, and the salutary purposes before mentioned cannot be effected without the aid and authority of parliament." The section then proceeds to vest the estates mentioned in the schedule to the act, in trustees for ever, "freed, released, and discharged, and absolutely acquitted, exempted, and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements in and by the said hereinbefore-recited indentures of settlement of the 30th and 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indentures

of the 3d and 4th of March, 1718, and the said recited act of parliament respectively created, limited, provided, and declared of or concerning the same manors, lordships, messuages, lands, tenements, hereditaments, and premises, and undivided parts and shares of manors or lordships, messuages, lands, tenements, hereditaments, and premises respectively, or any of them, except only such leases as have been heretofore made or granted of the same respectively, in pursuance of the powers contained in the said settlements and act of parliament," in trust for sale; and, on payment of the purchase-money, to convey and assure the same manors, lands, &c., unto and to the use of the

*620] *purchasers "freed and discharged, and acquitted, exempted, and exonerated as aforesaid." The 7th section contains a declaration, which was perhaps unnecessary, "that, in the meantime and until the said manors, messuages, farms, lands, tenements, hereditaments, and premises thereby directed to be sold, should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents, issues, and profits thereof should be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively, in case that act had not been made." That was the state of things in the year 1803: and it is submitted that it was not competent to the then Earl of Shrewsbury, or to John Earl of Shrewsbury in 1838 (of the lands in Oxton none having then been sold), to execute the power of leasing contained in the act of 1720, seeing that the lands had become vested in trustees, freed, exempted, and discharged from all the uses, limitations, powers, &c., to which they were subject under that act. Suppose the present earl, being the person now entitled to the rents and profits of those lands under the settlement and act of 1720, were to call upon the surviving trustee to perform the trust imposed by that act, and a purchaser were to object that the land was charged with the lease of 1838,—would not the short answer be, that the power of leasing under the act of 1720 no longer existed, and that the lease so granted was therefore void? As well might it be contended that the lands taken out of settlement by the act of 1720 might be charged with jointures or portions for younger children, as to say that they may be leased. The case is, in truth, too plain for argument.

*621] **Sir Hugh Cairns* (with whom was *Kay*), for the defendants.(a)—The lease in question was a valid exercise of the

(a) The points marked for argument on the part of the defendants were as follows:—

"That John Earl of Shrewsbury had power to demise by the indenture of lease of the 2d of February, 1838, the lands therein comprised, so as to bind the plaintiffs, because the power of leasing such lands which was conferred upon him by the Shrewsbury Estate Act, 1720, was not affected by the Shrewsbury Estate Act, 1803, as to lands which at the time of the exercise of such power had not been sold under the trust for sale contained in such last-mentioned act; and that therefore the said lease is valid for all the term and interest thereby demised: Or that, at any rate, the said lease is valid until the land therein comprised shall be sold and conveyed to a purchaser under the said last-mentioned trust for sale: Or that, if the said power of leasing conferred by the said act of 1720 would otherwise have been affected by the provisions of the said act of 1803, such power was relimited or recreated for all purposes by the 7th section of such last-mentioned act as to all lands not actually sold under the aforesaid trust for sale at the time of exercising such power: Or that at least such power was thereby relimited or recreated, so as to enable leases to be made thereunder which would be valid and

power contained in the act of 1720. It is conceded that the township of Oxton was included in that act, that the act gave power to the successive tenants in tail to grant leases, and that the lease granted by John Earl of Shrewsbury on the 2d of February, 1838, was a good compliance with that power, supposing it to remain unaffected by the provisions of the act of 1803. The last-mentioned act having authorized the trustees to sell the land, the court is asked to hold that all the machinery of the former act for the management of the Shrewsbury estate is thereby destroyed and put an end to; and *that [*622 without the slightest necessity. It appears by the schedule annexed to the act of 1803, that the quantity of land thereby authorized to be sold was very considerable, amounting to nearly 8000l. a year in value: and the whole or nearly the whole of it remains unsold to the present time. By that act the scheduled lands are vested in the trustees, Wright and Conolly (now represented by Lord Dynevor), for ever, freed and discharged from the uses, limitations, powers, &c., in the settlement and act of 1720, in the manner already mentioned. It may be conceded that the effect of these words, is, to vest the fee-simple in the lands in the trustees. But s. 7 shows, that, until the trust has been carried into execution by a sale, there is to be no disturbance of the possession or beneficial enjoyment of the lands,—in the meantime and until the lands, &c., shall be sold in pursuance of the trusts aforesaid, the same premises respectively “shall be held, possessed, and enjoyed, and the rents, issues, and profits thereof shall be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively, in case this act had not been made.” Until sale, there is to be no disturbance of the tenant in tail for the time being in the possession or beneficial enjoyment of the lands,—there is to be the same character, measure, and mode of enjoyment, and the same identity of person enjoying, as there was before the act passed. The argument on the part of the defendants seems to assume that John Earl of Shrewsbury had no estate at all in the lands in question, but was a sort of tenant at will to the trustees. It is submitted, however, that he was equitable tenant in tail: he was in as of his old estate, subject only to be defeated in the event of a sale of the land by the [*623 *trustees in pursuance of the trusts created by the act of parliament. Suppose a question of waste to arise: suppose John Earl of Shrewsbury had, whilst the lands remained unsold, claimed as tenant in tail to cut down timber, and the trustees interposed to prevent it, alleging that the fee-simple was vested in them,—might not the earl say, “The statute provides, that I am to hold, possess, and enjoy the rents, issues, and profits of the lands as I might have done if it had not passed?” A court of equity would unquestionably hold that there was nothing to interfere with the exercise of his right. The whole scope and object of the act was, not to qualify or lessen the enjoyment of the lands by the tenant in tail, but merely to provide means for giving a good title to a purchaser of the lands directed to be sold. The tenant in tail would in the meantime have an equitable estate tail, binding until the lands therein comprised should be sold and conveyed under the said trust for sale contained in the said last-mentioned act.”

with all the rights incident to such an estate; one of which is the power of leasing, without which there could be no complete enjoyment of it. Such a power is of the very essence of a settled estate. The argument on the part of the plaintiff must go this length, that, since the passing of the act of 1803, there could be no power to lease any of these lands, even from year to year. The trustees have no power to lease: they have merely a trust to sell, and make a title to a purchaser. Lord Mansfield thus speaks of the power of leasing, in a very elaborate judgment in *Taylor v. Horde*, 1 Burr. 120,—“Of all kinds of powers, the most frequent is that ‘to make leases.’ For the encouragement of farmers to occupy, stock, and improve the land, it is necessary that they should have some *permanent* interest. Unless the owner of the estate for life was enabled to make a *permanent* lease, he could not enjoy to the best advantage during his own time: and they who come after must suffer by the land being untenanted, *624] *out of repair, and in a bad condition. The plan of this power is for the *mutual* advantage of possessor and successor. The execution thereof is checked with many conditions, to guard the successor that the annual revenues shall not be diminished, nor those in succession or remainder at all prejudiced in point of remedy or other circumstance of full and ample enjoyment.” [ERLE, C. J.—What was Lord Mansfield speaking of there? Was the question whether there was a leasing-power in the instrument before him, or was he dealing with the construction of the power?] The question was, whether the power in that case had been properly pursued. His Lordship’s general observations tended to show that the existence of a leasing-power was essential to the beneficial enjoyment of the estate,—essential as well with regard to the interest of the tenant for life or in tail, as to that of the remainder-man. The observations of the Vice-Chancellor of England, in *Skeeles v. Shearley*, 8 Simons 153, are pretty much to the same effect. “As it is impossible,” he says, “that a settled estate can be enjoyed except by means of the exercise of a power to lease, the courts never allow leases granted by the tenant for life under his power to be defeated by the exercise of a power in the trustees to appoint new uses with the concurrence of the tenant for life.” The reason assigned by Sir L. Shadwell is this, that the power to lease is not, like any other power, one which the tenant for life is to exercise according to his will or caprice, but is a power which is essential to the enjoyment of the estate, to make it productive, and which becomes a part of the estate itself; and therefore it is favoured in a way in which no other power is favoured. [MONTAGUE SMITH, J.—Your argument is, that, under the 7th section of the act of 1803, the earls are equitable tenants for life, and that they have still the power of leasing created *625] *by the 10th section of the act of 1720?] That they are equitable tenants in tail. In Sugden on Powers, 8th edit. p. 712, the learned author says: “Lord Mansfield truly observed that of all kinds of powers the most frequent is that ‘to make leases.’ For the encouragement of farmers to occupy, stock, and improve the land, it is necessary they should have some permanent interest. Unless the owner of the estate for life was enabled to make a permanent lease, he could not enjoy to the best advantage during his own time; and

they who come after must suffer by the land being untenanted, out of repair, and in bad condition." Then, after referring to several authorities, he says: "The books abound with authorities in favour of the liberal construction of the power." The observations of Lord Redesdale in the well-known case of *Shannon v. Bradstreet*, 1 Sch. & Lefr. 61, afford a complete answer to a suggestion which has been made that the exercise by the tenant for life or in tail of the power of leasing under this 7th section would impede the performance of the trust for sale. "It is objected," says his Lordship, "that a leasing-power differs from all these cases of powers,"—that is, powers of charging for portions for younger children, or of jointuring,—“and the difference is said to consist in this, that, in the other cases, the remainder-man has no interest in the mode in which the power is executed, that he claims nothing under it: but that, under the leasing-power, he claims the rent reserved. Now, on what ground can it be contended that that which is a mere charge upon a remainder-man is to receive a more liberal construction than what is not a mere charge upon him, but may be much for his benefit? In the case of powers to make leases at the best rent that can be obtained, it is evident that the author of the power looks to the benefit of the estate, and that [*626] the power is given for the benefit both of the tenant for life and of all persons claiming after him; for, where the tenant for life can give no permanent interest, and his tenant is liable every day to be turned out of possession by the accident of his death, it is hard to procure substantial tenants; and therefore it is beneficial to all parties that the tenant for life should have a power to grant such leases. It is evident that the occupying tenant can afford to give a better rent under such circumstances, than if he were only to have a precarious tenure. We see from the lettings for three years in this court, and under custodiams in the Court of Exchequer, how disadvantageous short and precarious lettings are. But, if the letting be for twenty-one or thirty-one years, the tenant does not consider the amount of the profits for the first years so much as the profit during the term; and can afford to be out of pocket by expenditure for the first years, because in the subsequent years he will make it up by the improvements the estate receives in consequence of his expenditure. This, therefore, is a power which is calculated for the benefit of the *estate*. Other powers, generally speaking, such as jointuring powers and powers to make provisions for younger children, are calculated for the benefit of the *family*: they may be indirectly beneficial to the remainder-man in some respects; but they are no direct benefit to him; nor can I conceive why these powers should be construed more liberally than powers to make leases, except where it is evident that such power is abused: and, in case of letting leases, the power is certainly more liable to be abused than in making provisions for wife or children: in these latter cases, the sum to be raised is generally limited, and cannot be exceeded; but a power of leasing is to a certain extent a power of charging; if a fine is taken, it is unquestionably so; *and, even where no fine can be taken, it is to a certain degree [*627] a charge and for the benefit of tenant for life as well as the remainder-man, for, tenant for life will get a better rent than if he had no such power." It is obvious, therefore, that the exercise of this

power of leasing is for the benefit of the remainder-man: it is beneficial to the estate, and can in no degree interfere with the due exercise of the trust for sale. The intention of the 7th section was, that the earl for the time being should possess the estate as before until sale,—as tenant in tail in point of interest; and that the mode of managing and conducting the estate should continue the same: the only difference being, that his estate would be equitable instead of legal. [ERLE, C. J.—Your argument would have been more cogent if the 7th section had said that the person for the time being entitled should enjoy the same “estate” as before.] It was intended to preserve to him an equitable interest measured and defined by what his estate was before, but not to interfere with the legal estate vested in the trustees. No formal words are required to create a power. In Sugden on Powers, p. 102, it is said: “To the valid creation of powers there should be, first, sufficient words to denote the intention; secondly, an apt instrument; and, thirdly, a proper object. First, then, no precise form of words is necessary. Powers are mere declarations of trust, and therefore any words, however informal, which clearly indicate an intention to give or reserve a power, are sufficient for the purpose. In favour of the intention, the same rule prevails as to common-law authorities created either by deed or will.” It is now perfectly well settled that it is not inconsistent with the fee-simple being in trustees, that the power of tenant for life to lease should enable him to give to the lessee

*628] a legal estate in the term. This is well stated by Lord Tenterden in delivering the opinion of the judges in the House of Lords, in a case of Long v. Rankin, which is set out in the Appendix to Sugden, p. 895. “It is not essential,” says that learned judge, “to the validity of a leasing power, or of a lease granted in virtue of such a power, that the lessor should have any interest whatever in the land demised; such powers are not unfrequently given to persons to whom no estate in the land is given. They are often, and more often, given to persons to whom, as in the present instance, a life-estate is also given. On such occasions they are more or less guarded, according to the discretion of the settler, with provisos as to rent and other matters for the benefit of the remainder-man, and, so guarded, they are considered beneficial to the whole inheritance, and to all who may successively become entitled to portions of it, as providing the means of keeping the land continually in a proper state of cultivation. A leasing-power given to a tenant for life is usually spoken of in our books as a power appendant to the estate of the tenant for life; and it is said that the estate of the lessee is in such a case derived out of the estate of the tenant for life, for such period of the term as he may happen to live. It would probably be more correct to say that it operates upon that estate, than to say it is derived out of it even during that period. It is not necessary to say in the present case that a leasing-power may not by the terms in which it is given be inseparably annexed to the estate of the tenant for life, so as to become void and inoperative if he parts with his estate and transfers it to another. This probably may be so by the terms in which the power is given, because he who gives it may give it with what qualifications he

*629] pleases: but, as I have already observed, it is not essential to the validity of such a power that it should be appurtenant,

or annexed to any estate in the land. It is also immaterial to the remainder-man whether or not it be so annexed: his security depends upon the conditions and qualifications under which the power is to be executed, and not upon the estate or interest of the person by whom it is executed. If these are not duly observed, the lease is void as against him; and, if they are duly observed, it matters not to him whether the estate originally given to his predecessor continued vested in that predecessor at the time of granting the lease, or had been previously transferred to another person." What object could those who procured this act of parliament have in extinguishing the leasing power? The recitals clearly show that they had no such desire, but that the sole object of the act was to facilitate the sale of certain outlying parts of the estate, and the acquisition of other lands which might be more conveniently held with the main part of the property. Powers of jointuring and to raise money for younger children are powers for the benefit of the person exercising them, or that of his family: but the power of leasing is for the benefit of the estate, and in no way affects the power of sale or exchange. Lord St. Leonards, dealing with this subject, says,—Sugden on Powers 489,—“The nature of the powers, in most instances, sufficiently points out the priority to which the estates created under them are entitled. Thus, a power of sale must defeat every limitation of the estate, whether created directly by the deed or through the medium of a power, except estates limited to persons standing in the same situation as the purchaser; for example, a lessee, for the very object of a power of sale is to enable a conveyance to a purchaser discharged of the uses of the settlement, and it is immaterial whether *any [*680 particular use was really contained in the original settlement, or was introduced into it in the view of the law by the execution of a power contained in it. The same principle applies to a lease. As to powers executed in favour of the family, a jointure, whether created before or after a provision for the jointress's younger children, ought to take precedence of it; but they must both give way to a subsequent execution of a power to sell and exchange, or lease. As we have seen, the jointure and portions will be transferred to the new estates under the usual powers in settlements, and the leases will operate for their benefit. If a tenant for life had a power to charge a sum generally, and also powers to sell and exchange, and lease, &c., it is said that the use or estate appointed by either of those powers would vest in the appointee in possession, and no subsequent act of the tenant for life could defeat his own previous appointment in favour of a purchaser. If the subsequent could defeat the previous appointment, the appointee under the previous appointment would not take an estate in possession according to the express purport of the appointment. But this cannot be considered a general rule, for in some cases the charge appointed may be defeated by an exercise of the power of sale, and transferred to the estate to be purchased in lieu of it. In a case where, under a will, the tenant for life had a power of leasing, and the executors had a power to sell or mortgage, although it was held that an exercise of the latter power overreached the life-estate, and all estates created by way of interest out of it; yet it was assumed, both at the Bar and by the Bench, that a lease granted by the tenant

for life under his power, before the exercise of the power by the executors, had continuance *after* a mortgage executed under the latter power: and it was held that the mortgagee took the *immediate
 *631] reversion expectant upon the lease." *Bringloe v. Goodson*, 4 N. C. 726, 6 Scott 502. That case affords a very good illustration. In the act of 1720, there was a power for each successive tenant in tail to jointure. The argument on the part of the plaintiffs must go the length of contending that that power also was destroyed as to those lands by the act of 1803, and was not restored by the 7th section. It is unnecessary for the purpose of the defendants' case to grapple with that, because the power to lease stands upon much higher ground than the power of jointuring or any other power connected with the mere personal interest of the holder of the estate. If it be said that the power of jointuring still exists, it can only be on the ground that it is restored by the 7th section: and, if the power of jointuring is restored, why not also the power of leasing? By the act of 1720, the exercise of the power of leasing is attached as an incident to the actual possession of the estate. The proper mode of dealing with the 7th section of the act of 1803 is, to treat it as forming the first trust,—upon trust, until the manors, &c., should be sold, to permit and suffer the Earl of Shrewsbury for the time being to possess and enjoy the estates with all the incidents of enjoyment he would have had in case that act had not been made; and then upon trust to sell, &c. The possession and enjoyment are attributed to the limitations in the old settlement and in the act of 1720. By s. 1, a purchaser would take free from the power of leasing for the future, but subject to any lease which might have already been granted. Upon the whole, therefore, it is submitted that the leasing power was not destroyed by the act of 1803, but that, on the contrary, it was necessary to the enjoyment of the estate, an incident to the possession of it, and it was properly exercised upon the occasion in question.

*632] **Manisty*, Q. C., in reply.—The substance of the argument on the part of the defendants, is, that the 7th section of the act of 1803 restores to the Earl of Shrewsbury for the time being the estate he had before, with all the incidents to its possession and enjoyment,—that he has still, in equity, an estate tail, with all the rights and powers he had before the passing of that act, including the power of leasing. [ERLE, C. J.—The possession and enjoyment of the lands, not the estate.] In order to arrive at that conclusion, the court has been invited to transpose the provision in s. 7, and read it as the first trust imposed upon the trustees by the 1st section of the act. The authorities which have been referred to are not controverted. They all resolve themselves into this, that, when you find in a settlement a variety of powers which are all in a sense concurrent, you must look at the general scope of the instrument,—be it deed, or be it will,—in order to ascertain the order in which they are to take effect. It is in all cases a question of intention: and here it is submitted, that the language used in the act leads to a conclusion precisely opposed to that contended for by the defendants. The power was, to lease, not at the best rent that could be obtained, but at the old and accustomed rents, boons, and services, so as to enable the lessor to take a fine, and lease at a mere nominal rent. [BYLES, J.—And of an estate vested

in trustees to be sold.] Yes. It is impossible to conceive a mode of defeating the very object of the act more effectual and more certain than such form of leasing. When a power is repealed, it is always with a saving of all that had been done under it: this was the foundation of the decision of the Exchequer Chamber in *The Earl of Shrewsbury v. Scott*, 6 C. B. N. S. 221 (E. C. L. R. vol. 95). It would be contravening the very intention of the legislature, to read the 7th section of the act of *1803 as it is proposed on the part of the defendants: it can only be done by introducing words which [*633] are nowhere to be found in the act, and which certainly would have been introduced had the legislature so intended. The provision in s. 7 is the ordinary provision that is found in every estate act and in every marriage-settlement,—until the marriage shall take effect or the power of sale be exercised, the person entitled to the possession shall have and enjoy the rents and profits. Nothing is more common. As a mode of enjoyment, no doubt, the earl for the time being would be entitled to grant leases, but not such as to prejudice the remainderman, or to extend beyond his own time. The power of leasing is not given to the person in possession, simpliciter, but to the persons holding under the limitations of the settlement and act of 1720, all which limitations are annihilated and put an end to by the act of 1803. The intention is abundantly expressed by the words found in the various parts of the act: and there is nothing to oppose to them but surmise and conjecture.

ERLE, C. J.—I think our judgment in this case ought to be for the plaintiffs. The question turns upon the 7th section of the statute of 1803, 43 G. 3, c. 40: and the result of the several enactments leading up to that point, is this:—In the year 1720, the Shrewsbury estates had been settled in the manner recited in the statute 6 G. 1, c. 29, (a) and the settlement was confirmed by that act, the 10th section of which gave power to the persons therein named, and also to all and every other person and persons to whom the said manors, lands, hereditaments, and premises were limited by that act, “by any deed or deeds, &c., to demise or lease all or *any part or parts of the [*634] said messuages, lands, tenements, hereditaments, and premises whereof the person making such lease should be actually possessed, except the capital messuage, outhouses, gardens, and park of Heathropp, in the county of Oxon, to any person or persons in possession, and not in reversion, for the term of three lives or twenty-one years, or for any number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there be reserved and made payable yearly during the continuance thereof the usual and accustomed yearly rents, boones, and services for the same, and so as in every such lease there be contained a condition of re-entry for non-payment of the said rent and rents thereby to be reserved, and so as the lessee and lessees to whom such lease and leases shall be made do seal and execute counterparts of such lease and leases.” This power of leasing is one which is greatly for the benefit of the tenant in possession: it is not a power to grant leases at the best rent that could be obtained, but at “the usual and accustomed rents;” and these on most of the old estates were merely

(a) See the statute set out in 6 C. B. N. S. 64 et seq., in the notes.

nominal. So stood the Shrewsbury estates until the statute of 1803, whereby certain portions of the estate situate in the several counties of Salop, Chester, Berks, Wilts, and Oxford (of which the land now in question formed part), were taken out of settlement, and vested in trustees to sell and reinvest the purchase-money in other lands to be subject to the same uses, limitations, &c., as the lands so sold were subject to. The words of the first section are remarkably clear and absolute to exonerate the lands to be so sold from all uses, trusts, &c.: the trustees are to take them "for ever, freed, released, and discharged, and absolutely acquitted, exempted, and exonerated of and *635] from all and every the uses, trusts, estates, entails, *remainders, charges, powers, provisoes, limitations, and agreements in and by the thereinbefore recited indentures of settlement of the 30th and 31st of October, 1700, the will of Charles Duke of Shrewsbury (July 19th, 1712), the indentures of the 3d and 4th of March, 1718, and the recited act (6 G. 1, c. 29), respectively, created, limited, provided, and declared of and concerning the same manors, &c., or any of them." That particularly exonerates them from all powers: it vests the land, so exonerated from all powers, in the trustees, upon trust to sell, and, on payment of the purchase-money, to convey and assure the same respectively to the use of the purchaser or purchasers thereof, and his, her, or their heirs and assigns respectively, "freed and discharged, and acquitted, exempted, and exonerated as aforesaid." There could be no doubt, if there was nothing more in the act, that there would be an end of the power of leasing in respect of the lands dealt with by the act of 1803. But the 7th section enacts, that, "in the meantime and until the said manors, messuages, farms, lands, tenements, hereditaments, and premises thereby directed to be sold, should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents, issues, and profits thereof should be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively in case that act had not been made." Now, the question between the parties is, whether these words are to be construed in their literal sense, to give to the earl for the time being holding the Shrewsbury estates a right to the *possession* of the lands and premises comprised in the statute *636] of 1803, and to receive the rents and profits of those lands *merely, or whether in respect of those lands and premises it revived all the powers contained in the settlement and act of 1720, and among them the power of leasing contained in s. 10 of the last-mentioned act. It was contended on behalf of the plaintiffs that the words must be construed according to their ordinary acceptation, and that their ordinary acceptation would be, that the trustees should allow the Earl of Shrewsbury for the time being to possess and to receive the rents and profits of such of the lands as should not be sold under the power given to them for that purpose. But the question is, whether the section is to be so construed, or whether the Earl of Shrewsbury for the time being was to have the right to exercise in respect of those lands the leasing power granted by the former act. I was much impressed with the argument of Sir Hugh Cairns, being

very desirous of upholding estates which have been granted, and of preventing them from being defeated by doubtful words. The line of argument would have been most clear and satisfactory to my mind, if the tenant for life had been required to reserve the best and most improved rent that could be obtained for the premises so leased; because then the power to sell and exchange might have been read into the settlement and the act of 1720, and that would have produced pretty nearly the same result. But it is not so. The history of settlements and the doctrine of powers was perhaps not so well understood then as it has since become. We cannot, however, be swayed by considerations of that sort: we can only deal with the language which is before us. I think we should be defeating the object of the statute of 1803, if we were to hold that the tenant for life might grant leases for ninety-nine years, determinable on lives, at a nominal rent, and taking a fine, which would in effect be selling the land for so long a time as the leases should enure. *I cannot believe,—the statute contemplating an immediate sale by [*637 the trustees,—that the 7th section intended to re-create the power contained in the 10th section of the act of 1720, and so to a great extent defeat the power of sale which was its main object. I therefore come to the conclusion that the power of leasing was not revived, and consequently that the lease of the second of February, 1838, came to an end with the life of the grantor, and that the plaintiffs are entitled to succeed.

WILLES, J.—I am of the same opinion. At one time, under the influence of the able argument addressed to us on the part of the defendants, I was disposed to think that the enjoyment contemplated by the 7th section of the act of 1803 included the power to make such a lease as that now in question. But I am now satisfied that that is not the point upon which the decision of this case ought to turn. The question is, whether the enjoyment spoken of in s. 7 involves the making of such a lease as was contemplated by the 10th section of the 6 G. 1, c. 29,—not only the making of such a lease as might come within the terms of the 10th section of that act, but of every lease which would come within the terms of that section, because it seems to be impossible to divide the power, and to say that the 7th section gives the tenant in tail for the time being a power to make some or one of the leases which the 10th section of the act of 1720 would authorize, without holding that he may make all or any of such leases: the power must extend to all, or it can justify none at all. Take, for instance, one lease which might be made under the 10th section, viz. a lease of property which had become much improved between the time of G. 1 and the act of 1803, and in respect of which only the rent accustomed at the *time of the 6 G. 1, or before that time, [*638 had been reserved, and in respect of which the Earls of Shrewsbury from time to time had been in the habit of taking fines for renewals,—it is clear that in such a case a large fine might have been taken, instead of, as in this case, a stipulation that the lessee should lay out a sum of money on the land. There are no words in that 10th section prohibiting the taking of any fine or foregift. So long as the accustomed rent was reserved, there was nothing to prevent the lessor from stipulating for a fine in respect of the improvements on

the land. Such a fine would obviously be a payment for the enjoyment of the land during the term: it would in effect be a sale of the land in future. Whether such a lease comes within the 7th section of the act of 1803 or not, depends upon whether that section provides for the enjoyment of the profits of the land arising between the period of the vesting of the estate in the trustees for sale and the sale, or whether it meant to deal with the future profits of the land to be received by way of fine upon the granting of leases. I am of opinion that it deals with the former, and not with the latter; and that it would be doing violence to the words to give them a construction which should make them include the latter. I am further of opinion that the 7th section, being declaratory in terms, cannot authorize anything which would be in opposition to what the trustees are required to do by s. 1. That leads to the conclusion that present profits only were intended to be dealt with by s. 7. The words are plain,—“In the meantime and until the said manors, messuages, &c., hereby directed to be sold, shall be sold in pursuance of the trusts aforesaid, the same premises respectively shall be held, possessed, and enjoyed, and the rents, issues, and profits thereof shall be had, received, and *639] taken by and *be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively in case this act had not been made.” That is not an enactment that the rents are to be received and taken as if the act had not been made; but that the person who is to enjoy is the person who would have enjoyed if the act had not been made. It is clear that these words, which in themselves only import an enjoyment of the rents, issues, and profits as they arise from time to time, could not have been intended to have any further effect, so as to entitle the equitable tenant in-tail to acquire to himself, not only the profits from time to time, but also the profits of the future interest in the land, because the power to dispose of the future interest in the land had already by the 1st section been vested in the trustees. By whatever road, therefore, one approaches the 7th section, it appears to be one which not only does not include, but expressly excludes, the power now asserted: it excludes everything but a temporary enjoyment of the rents and profits. I am fortified in that construction of the 7th section by a reference to the exception in s. 1,—“except only such leases as have been heretofore made or granted of the same respectively in pursuance of the powers contained in the said settlements and act of parliament.” That shows that the framer of the act had in his mind this very power of leasing. Notwithstanding what has taken place, I cannot but think that it was intended that the contemplated sales should be effected with all convenient speed. I must own I was at one time almost convinced by the arguments urged by Sir Hugh Cairns in favour of the lease: but, looking at the nature and character of the power contained in the 10th section of the act of 1720, a power which *640] goes beyond the present enjoyment of the *profits, I come at last without any hesitation to the conclusion arrived at by my Lord and the rest of the court, viz. that the lease in question was not warranted by the power, and is void.

BYLES, J.—I also am of opinion that the plaintiffs are entitled to

the judgment of the court. The key to the right interpretation of the act of 1803 is to be found in the recitals which are contained in the first section, that certain of the estates settled and limited by the settlement of the 4th of March, 1718, and the act of 1720, consisted of undivided parts and shares, and others were dispersed in many parcels, and lay in many parishes and places very distant from each other, and that it would be greatly for the benefit of the then earl and those entitled in remainder after him under the limitations in the said settlement and act, if all the estates situated in the counties of Salop, Chester, Berks, and Wilts, and certain detached parts of the said estates in the county of Oxford, were sold, and that the money arising from the sale thereof should be laid out in the purchase of other estates lying within the counties of Oxford, Worcester, Stafford, and Chester, or some of them, to be settled as nearly as might be to the same uses. The first and paramount object of the act of 1803, therefore, was, to sell the lands in the schedule thereto for the best price that could be got for them. Now, it is obvious that that object would be at once defeated by a sale of premises which had just been demised for twenty-one years or three lives at what might be nominal rents. All powers of leasing contained in the act of 1720 are extinguished by the later act: and by the 7th section of the last-mentioned act it is declared that in the mean time the premises shall be held and enjoyed, and the rents, issues, and profits thereof received and taken by and *be ap- [*641 plied to and for the benefit of such person and persons as would have been entitled thereto in case that act had not been made. Upon the construction contended for by the defendant, they would be taking the rents and also a portion of the purchase-money on the sale of the premises, for the term for which the leases were granted. Are we to imply any such power? There is no express power: all express powers are extinguished. It was thought possibly, although the words are "estates and powers," that the leases already granted would be extinguished: therefore the act of parliament expressly excepts "such leases as have been heretofore made or granted of the same respectively in pursuance of the powers contained in the said settlements and act of parliament." Why should the legislature with so much care preserve those leases, if it left to the persons in possession of the estates for the time being the power to make leases far more disadvantageous to those in remainder, because they would have a longer period to run, if it allowed them to deal with the estate in the way in which the original power allowed them to deal with it? Why should not the power be expressed? I see no reason why it should not be expressed, except that it was never meant. Besides, it is to be observed that a speedy sale was intended: it never was contemplated that the sale would be delayed for sixty years and upwards, but that it would take place within a short or at all events a reasonable time. The power to lease, therefore, is not express; and to imply it would, as it seems to me, frustrate the manifest intention of the act. I trust no injustice will be done by our decision. If the lease contains a covenant for quiet enjoyment, the lessee will have a sufficient remedy; and, if not, such a covenant is implied under the word "demise." For these reasons, I concur with my Lord and my Brother

*642] *Willes that our judgment in this case must be for the plaintiffs.

MONTAGUE SMITH, J.—I am of the same opinion. The only question is, whether the leasing power created by the 10th section of the Shrewsbury Estate Act of 1720 was in existence in 1838, when the lease referred to in the special case was granted. I am of opinion that it was not. The 1st section of the act of 1803 vests the fee-simple of those portions of the estates now in question in trustees for sale, freed, released, and discharged, and absolutely acquitted, exempted, and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements in and by the recited settlements, will, and act of parliament respectively created, limited, provided, and declared of or concerning the same,—except only such leases as had been theretofore made or granted of the same respectively, in pursuance of the powers contained in the said settlements and act of parliament. It may be that that exception was not necessary: but, at all events, it was useful, to remove all doubt as to those leases. If it had been intended to preserve the future power of leasing, that would have been a very apt place to insert it. The question is, whether that power is preserved or re-created by the 7th section of the act of 1803. The enactment in s. 1 being, so perfectly clear and distinct, one would expect to find very strong words to show that that direct effect was not intended. I find no such words in the act. It is admitted by Sir Hugh Cairns that no new power of leasing is given in direct words: but he says, and says very truly, that, if we can collect from the language which the legislature has used an intention to restore or to

*643] re-create the power, we must give effect to it, though no formal words are used for the purpose. I find nothing to warrant me in thinking that any such intention was entertained. I conceive that every word of the 7th section may be fully satisfied without putting upon it the construction for which Sir Hugh Cairns has contended. He insists that the whole object of the act of 1803 was, to add a power of sale to the limitations already found in the settlements and in the act of 1720. If that had been intended, it might have been effected without disturbing any of the existing legal estates. It seems to me that the intention clearly was, and is clearly expressed, to vest the legal estate in fee-simple in the trustees. No doubt, a power of leasing may be exercised by one who has not the legal estate; but then there must be clear and unambiguous words to show such an intention. I should have been glad if we could have supported the lease. But I am clearly of opinion that the power of leasing had no existence at the time this lease was granted.

Judgment for the plaintiffs.

THE RIGHT HON. HENRY JOHN CHETWYND, EARL OF SHREWSBURY AND EARL TALBOT, AND THE RIGHT HON. GEORGE RICE, BARON DYNEVOR, v. HARBORD and Others. *June 6.*

[See the head-note of the preceding case.]

THIS was an action of ejectment brought by the plaintiffs against the defendants to recover possession of certain messuages, lands, and hereditaments, in the township of Oxton, in the parish of Woodchurch, and county of Chester, to the possession whereof the plaintiffs, or one of them, claimed to be entitled.

*The cause came on for trial before Williams, J., at the Chester Spring Assizes, 1864, when a verdict was found for [*644 the plaintiffs, subject to the opinion of the court upon the following case:—

[The first twelve paragraphs were substantially the same as in Keightley's Case, *antè*, p. 606. The case then proceeded as follows:]

13. In the year 1827, Charles Earl of Shrewsbury died, without issue male; and, upon his death, the title and the last-mentioned lands descended to John Earl of Shrewsbury, the lessor named in the leases hereinafter mentioned.

14. By "The Shrewsbury Estate Act, 1843" (6 & 7 Vict. c. 28), after reciting, amongst other things (as the fact was), that the said John, the then Earl of Shrewsbury, had no issue male, and that he was the heir male of the body of the said George Talbot, and tenant in tail male in possession of the said settled hereditaments and premises; and that it would be for the benefit of the said John Earl of Shrewsbury and those who might succeed to the settled estates, if certain hereditaments were vested in trustees in trust to sell the same, with a provision for investing the moneys to arise thereby in the purchase of other hereditaments, to be settled to the uses and under the restrictions which should be subsisting or capable of taking effect in the settled estates not vested by the act of 1803 in trustees to be sold; and that it would be for the benefit of the said John Earl of Shrewsbury and those succeeding to the settled estates, if the said John Earl of Shrewsbury and the successive takers of the said settled estates were enabled to lease, and to enter into contracts for leasing, any part or parts of the said settled estates, for such terms of years and under such provisions as would induce persons to build upon or improve the same, or to repair the messuages or *tenements or other [*645 buildings standing thereon, or to build others in lieu thereof, —it was enacted, that all and singular the manors or lordships, messuages or farms, lands, tenements, and other hereditaments particularly mentioned and described in the second schedule to the said act of 1843 (which schedule does not include any of the lands in the township of Oxton) should from and after the passing of the said act be vested in certain persons in the said act mentioned, their heirs and assigns, for ever, freed and absolutely acquitted, exempted, exonerated, and discharged from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements, in and by the said indenture of the 31st of October, 1700, the said

will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March, 1718, and "The Shrewsbury Estate Act, 1720," respectively created, limited, provided, and declared of and concerning the same manors, messuages, farms, lands, tenements, hereditaments, and premises, or any of them, upon trust with all convenient speed to sell and dispose of all and singular the said manors, &c., so by the said act vested as aforesaid, subject and without prejudice to any lease or leases which might have been made under the power of leasing in the said act thereafter contained.

15. By section 11 of the said act, the aforesaid power of leasing contained in the said act of 6 G. 1, was repealed; and by section 12 new powers of leasing were created.

16. By the 18th section of the new act, it is enacted that it should be lawful for the said John Earl of Shrewsbury, during his life, and, after his decease, for every other person to whom the said hereditaments and premises limited by the said indenture of the 4th of March, 1718, and the said Shrewsbury *Estate Act of 1720, were by *646] the said settlement and act respectively limited, as and when they should respectively, by virtue of the limitations aforesaid, be in the actual possession or entitled to the receipt of the rents, issues, and profits of the said settled estates, to accept a surrender or surrenders of any lease or leases which had been granted for lives, or for years determinable upon lives, under the power of leasing contained in the said "Shrewsbury Estate Act, 1720," and, upon such surrender, to demise to the person making such surrender, or to such person as he should nominate, the hereditaments comprised in the said surrendered lease, for any term of years absolute, in possession, not exceeding sixty years, to be computed from the date of the surrendered lease, so as upon every lease to be so granted there should be reserved and made payable during the continuance thereof such and the same rents, issues, and services, as would have been payable for the premises if the surrendered lease had been a lease for a like term of years absolute to the lessee to be named in such new lease.

17. By the 33d section of the said act it was enacted that it should be lawful for the said John Earl of Shrewsbury, during his life, and, after his decease, for all and every other person and persons to whom the said hereditaments and premises limited by the said indenture of the 4th of March, 1718, and the said "Shrewsbury Estate Act, 1720," are by the said settlement and act respectively limited successively as aforesaid, as and when they should respectively, by virtue of the limitations aforesaid, be in the actual possession or entitled to the receipt of the rents and profits of the lands which should for the time being stand limited and settled to such of the uses limited by the said *647] settlement of 1718 and the said act of *1720 respectively as aforesaid, as should be then subsisting or capable of effect, by indenture, to be sealed and delivered by him in the presence of two or more credible witnesses, to demise or lease all or any parts of the same lands, for any term or number of years, not exceeding ninety-nine years, in possession, to any person whomsoever, upon building leases, so as in such lease should be reserved the best yearly rent that could be reasonably had or gotten for the same, and that such leases should contain certain covenants in the said act particularly mentioned.

18. Section 35 conferred powers to enter into contracts for leases. Section 36 contained a provision that such contracts should contain provisoes for re-entry. Section 37 authorized the granting of new leases when possession had been recovered under the power of re-entry. Section 38 gave power to alter, vary, and rescind contracts; and section 39 gave powers to confirm leases containing technical errors.

19. By the 40th section of the said act, power is given to Earl John during his life, and, after his decease, for every person to whom the said hereditaments and premises limited by the indenture of the 4th of March, 1718, and the act of 1720, were by the said settlement and act respectively limited, as and when they should respectively, by virtue of the limitations aforesaid, be in the actual possession or entitled to the receipt of the rents and profits of the lands which for the time being should stand limited and settled to such of the uses limited by the said indenture of the 4th of March, 1718, and the said act of 1720, respectively, as should then be subsisting or capable of effect, to demise or lease all the mines in, under, or upon any part of the said lands situate in the townships of Little Neston, Oxton, and *other places, in the counties of Chester, Salop, and Stafford, [*648 in the manner in the said section mentioned.

20. By indenture of lease, dated the 2d of February, 1841, and made between the said John Earl of Shrewsbury of the one part, and Edwin Lewis and George Hibbard of the other part (which for the purpose of this case is admitted to have been executed and perfected in conformity with the powers contained in the act of 1720 save in so far as herein appears to the contrary), the said earl demised a piece of land containing one acre and two roods, part of Heath Hey, in the said township of Oxton, to the said Lewis and Hibbard, for ninety-nine years, at the yearly rent of 7*l.* 10*s.*, if certain persons therein named should so long live.

21. The land comprised in this lease forms part of the land sought to be recovered in this action.

22. By indenture, dated the 12th of December, 1843, and made between the said John Earl of Shrewsbury of the one part, and Francis George Harbord of the other part (which for the purpose of this case is admitted to have been executed and perfected in conformity with the power contained in the act of 1843, save in so far as herein appears to the contrary), it was witnessed, that, for and in consideration of the surrender of the said lease of the 2d of February, 1841, and of the rents and covenants in the said lease of the 12th of December, 1843, contained, the said earl did demise to the said Francis George Harbord the said piece or parcel of land, for fifty-five years from 2d February, 1841, at the yearly rent of 7*l.* 10*s.*

23. By indenture of lease dated the 2d of August, 1841, and made between the said John Earl of Shrewsbury of the one part, and the said Messrs. Lewis and Hibbard of the other part, and executed and perfected in like manner as the said first-mentioned lease, the [*649 *said earl demised a piece of land containing three roods, other part of Heath Hey, in the said township of Oxton, to the said Messrs. Lewis and Hibbard, for ninety-nine years, at the yearly rent of 8*l.*, if certain persons therein named should so long live.

the defendants to recover possession of certain messuages, lands, and hereditaments, in the *township of Oxton, in the parish of *652] Woodchurch, and county of Chester, to the possession whereof the plaintiffs, or one of them, claimed to be entitled.

The cause came on for trial before Williams, J., at the Chester Spring Assizes, 1864, when a verdict was found for the plaintiffs, subject to the opinion of the court upon the following case:—

[The first twelve paragraphs of the special case were substantially the same as in Keightley's Case, *antè*, p. 606. The case then proceeded as follows]:—

13. In the year 1827, the said Charles Earl of Shrewsbury died without issue male; and, upon his death, the title and the said last-mentioned lands descended to John Earl of Shrewsbury, the lessor named in the lease hereinafter mentioned.

14. By the Shrewsbury Estate Act, 1843 (6 & 7 Vict. c. 28), after reciting amongst other things (as the fact was) that the said John, the then Earl of Shrewsbury, had no issue male, and that he was the heir male of the body of the said George Talbot, and tenant in tail-male in possession of the said settled hereditaments and premises, and that it would be for the benefit of the said John Earl of Shrewsbury and those who might succeed to the settled estates, if certain hereditaments were vested in trustees in trust to sell the same, with a provision for investing the moneys to arise thereby in the purchase of other hereditaments to be settled to the uses and under the restrictions which should be subsisting or capable of taking effect in the settled estates not vested by the act of 1803, in trustees to be sold; and that it would be for the benefit of the said John Earl of Shrewsbury and those succeeding to the settled estates, if the said John Earl of Shrewsbury *and the successive takers of the said settled estates were *653] enabled to lease, and to enter into contracts for leasing, any part or parts of the said settled estates for such terms of years and under such provisions as would induce persons to build upon or improve the same, or to repair the messuages or tenements or other buildings standing thereon, or to build others in lieu thereof,—it was enacted, that all and singular the manors or lordships, messuages or farms, lands, tenements, and other hereditaments particularly mentioned and described in the second schedule to the said act of 1843 (which schedule does not include any of the lands in the township of Oxton), should from and after the passing of the said act be vested in certain persons in the said act mentioned, their heirs and assigns for ever, freed and absolutely acquitted, exempted, exonerated, and discharged from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements, in and by the said indenture of 31st October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March, 1718, and The Shrewsbury Estate Act, 1720, respectively created, limited, provided, and declared of and concerning the same manors, messuages, farms, lands, tenements, hereditaments, and premises, or any of them, upon trust with all convenient speed to sell and dispose of all and singular the said manors, &c., so by the said act vested as aforesaid, subject and without prejudice to any lease or leases which

might have been made under the power of leasing in the said act thereafter contained.

15. By section 11 of the said act, the aforesaid power of leasing contained in the said act of 6 G. 1, was repealed, and by section 12 new powers of leasing were created.

16. By the 33d section of the said act it was enacted *that [*654 it should be lawful for the said John Earl of Shrewsbury during his life, and, after his decease, for all and every other person and persons to whom the said hereditaments and premises limited by the said indenture of the 4th of March, 1718, and the said Shrewsbury Estate Act, 1720, are by the said settlement and act respectively limited successively as aforesaid, as and when they should respectively by virtue of the limitations aforesaid be in the actual possession or entitled to the receipt of the rents and profits of the lands which should for the time being stand limited and settled to such of the uses limited by the said settlement of 1718 and the said act of 1720 respectively as aforesaid, as should be then subsisting or capable of effect, by indenture, to be sealed and delivered by him in the presence of two or more credible witnesses, to demise or lease all or any parts of the same lands, for any term or number of years not exceeding ninety-nine years in possession, to any person whomsoever, upon building leases, so as in such lease should be reserved the best yearly rent that could be reasonably had or gotten for the same, and that such leases should contain certain covenants in the said act particularly mentioned. Section 35 conferred powers to enter into contracts for leases. Section 36 contained a provision that such contracts should contain provisos for re-entry. Section 37 authorized the granting of new leases when possession had been recovered under the power of re-entry. Section 38 gave power to alter, vary, and rescind contracts; and section 39 gave powers to confirm leases containing technical errors.

17. By the 40th section of the said act, power is given to Earl John during his life, and, after his decease, for every person to whom the said hereditaments and premises limited by the indenture of the 4th of March, 1718, and the act of 1720, were by the said *settle- [*655 ment and act respectively limited, as and when they should respectively, by virtue of the limitations aforesaid, be in the actual possession or entitled to the receipt of the rents and profits of the lands which for the time being should stand limited and settled to such of the uses limited by the said indenture of the 4th of March, 1718, and the said act of 1720 respectively as should then be subsisting or capable of effect, to demise or lease all the mines in, under, or upon any part of the same lands situate in the township of Little Neston, Oxton, and other places, in the counties of Chester, Salop, and Stafford, in the manner in the said section mentioned.

18. By indenture of lease made the 2d of February, 1851 (which for the purposes of this case was admitted to have been executed and perfected in conformity with the power contained in the act of 1843, save in so far as herein appears to the contrary), between the Right Hon. John Earl of Shrewsbury of the one part, and James Beazley of the other part, it was witnessed, that, under and by virtue of the power and authority in that behalf given and reserved to the said

earl by the Shrewsbury Estate Act, 1843, and of every or any other power or authority enabling the said earl in that behalf, the said earl did demise to the said James Beazley a certain plot of land in the said township of Oxton, for ninety-nine years from the 2d of February, 1851.

19. The land comprised in this lease was the land sought to be recovered in this action.

20. On the 9th of November, 1852, the said John Earl of Shrewsbury died without leaving any male issue, and thereupon Bertram Arthur, 17th and last Earl of Shrewsbury, succeeded to the title and estates annexed to it. He died a bachelor on the 10th of August, *656] 1856, and thereupon the issue male of George *Talbot, on whom the estates were by the settlement of the Duke of Shrewsbury and by the said act of 1720 settled in tail-male, became extinct; and thereupon (upon failure and in default of issue male of the said Gilbert Earl of Shrewsbury, of the said George Talbot, and of the said John Talbot, in the said act mentioned,) the plaintiff, the present Earl of Shrewsbury, became and now is the person, being issue male of the body of the said John, first Earl of Shrewsbury, to whom the said title, honour, and dignity of Earl of Shrewsbury has, after the decease as aforesaid of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, without issue male of their respective bodies, by virtue of the said letters-patent of creation of the said earldom, descended and come.

21. Copies of the acts of parliament referred to, and a copy of the lease hereinbefore mentioned, accompanied and were to be considered parts of this case.

The question for the consideration of the court in this action was,—whether John Earl of Shrewsbury had power to demise, by the said indenture of lease of the 2d of February, 1851, the lands therein mentioned, so as to bind the plaintiffs.

If the court should be of opinion in the negative of the above question, the plaintiffs, or such one of them as the court should direct, were or was to have judgment to recover the lands described in the writ in this action, with costs. If the court should be of opinion in the affirmative of the above question, the defendants in the said action were to have judgment in the said action, with costs.

Manisty, Q. C. (with whom was *Hannen*), for the plaintiffs.(a)—The

(a) The points marked for argument on the part of the plaintiffs were as follows:—

“1. That neither of the acts mentioned in the case conferred a power to make the lease in question:

“2. That, by the act of 1803, the lands thereby vested in trustees for sale were entirely taken out of settlement, and the previously existing power to lease them was put an end to:

“3. That the continuance of the previously existing power to lease the lands vested in trustees for sale would be inconsistent with the trust for sale:

“4. That the 1st section of the act of 1803 by implication declares that the only leases which were to be valid were such as had been made before the passing of that act, and therefore that any subsequently made should be void:

“5. That there was not after the passing of the act of 1803 any power to lease any of the lands which by it were vested in trustees for sale:

“6. That the leasing power conferred by the 33d section of the act of 1843 is confined to the lands for the time being limited and settled to the subsisting uses of the settlement of 1718 and the act of 1720 respectively, and is not exercisable over lands which had been taken out of settlement, and were by the act of 1803 vested in trustees for sale:

“7. That the power conferred by the 33d section of the act of 1843 was to be exercised only

question in this case is whether *the lease granted by John Earl of Shrewsbury on the 2d of February, 1851, of certain [*657 land in the township of Oxton, in the county of Chester, is a valid lease. The act of parliament upon which the defendants rely in support of that lease is an act of 6 & 7 Vict. c. 28, passed in the year 1843, which had two main objects,—one, the taking out of settlement certain other of the Shrewsbury estates and vesting them in trustees for sale,—the other, to regulate all the settled estates properly so called. The power of leasing which is relied on is that contained in the 33d section, which enacts that “it shall be lawful for the said John Earl of *Shrewsbury during his life, and, after his [*658 decease, for all and every other persons and person to whom the said manors, hereditaments, and premises limited by the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, are by the same settlement and act respectively limited successively as aforesaid, as and when they shall respectively by virtue of the limitations aforesaid be in the actual possession or entitled to the receipt of the rents and profits of the lands which for the time being shall stand limited and settled by virtue of or under the said indenture of the 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, or any of them, or by virtue of or under or by means of any purchase, exchange, or partition, or any act or acts for enclosure, or otherwise howsoever, to such of the uses limited by the said indenture of the 4th of March, 1718, and the said act of 6 G. 1 respectively as aforesaid, as shall then be subsisting or capable of effect,”—“to demise or lease all or any part or parts of the same lands,” except, &c., “for any term or number of years not exceeding ninety-nine years, in possession, to any person or persons whomsoever who shall be willing substantially to improve or repair any of the present or any future houses or buildings upon any part of the same lands,” &c.,—“so as in every such lease or demise there be reserved and made payable the best yearly rent that can be reasonably had or gotten for the same, to be made payable half-yearly or oftener; and so that every such lease or demise be made without taking any fine, premium, or foregift, or anything in the nature thereof, for or in respect of the making of the same,”—with the usual covenants and conditions. The 1st section, after reciting the several settlements and the act of 1720, and reciting (amongst other *things) the expe- [*659 diency of selling certain portions of the estates described in the second schedule annexed to the act,—that, in consequence of the great increase in the annual value of the settled estates since the passing of the 6 G. 1, it was reasonable that the jointuring power should be increased,—that it would be for the benefit of the said John Earl of Shrewsbury and those succeeding to the settled estates, if the power of leasing contained in the 6 G. 1 were repealed, and the said Earl and the successive takers of the settled estates were enabled to grant leases for any term not exceeding twenty-one years, in possession, at rack-rent, or leases for such terms and under such provisions

by parties for the time being in possession or receipt of the rents by virtue of the settlement of 1718, and the act of 1720; and that Earl John never was in possession or receipt of rent by virtue of the said settlement and act.”

as would induce persons to build upon or improve the same, and also to grant mining leases. It then proceeds to vest all the lands in the second schedule described, in trustees, their heirs and assigns for ever, "freed and absolutely acquitted, exempted, exonerated, and discharged of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements in and by the said indenture of the 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March, 1718, and the said act of 6 G. 1 respectively created, limited, provided, and declared of and concerning the same manors," &c., upon trust, with the consent of the person who for the time being shall be in the possession of the settled estates by virtue of the limitations before mentioned, to sell and dispose of the same, "subject and without prejudice to any lease or leases which may have been made under the power of leasing thereafter contained." Now, the powers of leasing and jointuring had already been repealed, as regarded Oxton, by the act of 1803. By s. 3, the lands purchased with the proceeds of the sales *660] were to be "conveyed, settled, and *assured to the uses, and with, under, and subject to the powers, provisoes, conditions, limitations, restrictions from alienation, declarations, and agreements to, with, under, and subject to which the said manors, &c., hereby vested in trust as aforesaid would have stood limited and settled if the same had not been so vested in trust as aforesaid, or as near thereto as the nature of the estates to be purchased and other circumstances will admit." By s. 5, which is similar to, though stronger in terms than, the 7th section of the act of 1803, it is enacted, "that, in the meantime and until such sale or sales as aforesaid, the said manors and other hereditaments hereby vested in trust as aforesaid, or the unsold part or parts thereof for the time being, shall be held and enjoyed, and the rents, issues, and profits thereof had, received, and taken by and for the benefit of such person or persons as would have been entitled thereto and ought to have held and enjoyed the same in case the same premises had not by this act been so vested in trust as aforesaid." The real question is, whether the 33d section includes the lands in Oxton. It is submitted that it does not,—the lands in Oxton having by the act of 1803 ceased to be part of the "settled estates." The power of leasing created by the act of 1843 was to be exercised in respect only of lands which stood limited to the uses which were subsisting and capable of taking effect under the limitations contained in the settlement of 1718 and the act of 1720: and there is nothing to show that it was intended to extend that power to Oxton, which had ceased to be subject to those limitations.

Sir Hugh Cairns (with whom was *Kay*), for the defendants. (a)—The *661] lease now in question is in all *respects a compliance with the provisions contained in the 33d section of the 6 & 7 Vict. c.

(a) The points marked for argument on the part of the defendants were as follows:—

"The defendants will contend that John Earl of Shrewsbury had power to demise by the indenture of lease of the 2d of February, 1851, the lands therein mentioned, so as to bind the plaintiffs, because the power of leasing which was conferred upon him by the Shrewsbury Estate Act, 1843, extended to and included the lands comprised in the said lease, and the exercise of such power vested the legal estate in such lands in the leasees for the term expressed in such lease, or at least until the said property should be sold and conveyed under the trust for sale in that behalf contained in the act of 1803, in the special case mentioned."

28: it is a building-lease, and contains all the covenants and conditions which are required for the protection of those in remainder to the settled estates. The objects of the statute of 1843 were, to vest in certain trustees the lands described in the second schedule for the purpose of sale, the proceeds to be invested in the purchase of other lands to be settled to the same uses, and to repeal the then-existing power of leasing, and to substitute other powers of leasing in lieu thereof. The main contention on the part of the plaintiffs, is, that this newly-created power of leasing applies only to the "settled estates," properly so called, and that Oxton, having been taken out of settlement and vested in trustees for sale under the act of 1803, was no longer a part of the "settled estates," and so not affected by the leasing power contained in the act of 1843. The township of Oxton, however, is specifically mentioned in s. 40, as one of the parishes or townships to which the power of granting "mining leases" is extended; and that in terms precisely the same as those contained in the 33d section. The special case states that the whole of the township of Oxton was dealt with by the act of 1803, and vested in trustees for the purpose of sale. There can be no doubt, therefore, as to the *intention. The language in which the estates in question are dealt with in the 1st section of the act of 1843 is as follows:— [*662

"Be it enacted that all and singular the manors, messuages, &c., mentioned and described in the second schedule to this act," with all appurtenances, &c., "shall, from and after the passing of this act, be vested in and settled upon, and the same are hereby from henceforth vested in and settled upon, John Wright and E. W. Jerningham, and their heirs, to the use of them the said John Wright and E. W. Jerningham, their heirs and assigns for ever, freed and absolutely acquitted, exempted, exonerated, and discharged of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements in and by the said indenture of the 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March, 1718, and the said act of parliament of 6 G. 1, respectively created, limited, provided, and declared of and concerning the same manors or lordships, messuages, farms, lands, tenements, undivided parts or shares, hereditaments, and premises, or any of them; nevertheless, upon the trusts and for the intents and purposes hereinafter expressed and declared of and concerning the same, that is to say, upon trust that they the said John Wright and E. W. Jerningham and the survivor of them, and the heirs of such survivor, or their or his assigns, do and shall with all convenient speed, with the consent and approbation of the said John Earl of Shrewsbury, to be testified by some writing under his hand, and, after his decease, then with the consent of the person who for the time being shall be in the possession of the settled estates by virtue of the limitations before mentioned, &c., sell and dispose of all and every the said manors or lordships, messuages, farms, lands, tenements, undivided parts or *shares, hereditaments, and premises [*663

so by this act vested as aforesaid, with their rights, members, and appurtenances,—*subject and without prejudice to any lease or leases which may have been made under the power of leasing hereinafter contained.*" The argument on the part of the plaintiffs, is, that, when the

lands were vested in trustees for the purpose of sale, they ceased to be settled estates. That which is said of Oxton may be said of all the lands vested in the trustees by this act. But it is obvious from the above recital that the act contemplated the leasing of the lands therein mentioned between the time of its passing and their sale. The lands when sold are to be conveyed to the purchasers "freed and absolutely acquitted, exempted, exonerated, and discharged as *aforesaid*, but *subject and without prejudice as aforesaid*;" that is to say, freed from the old limitations, but subject and without prejudice to any leases which may have been made under the leasing-power therein-after contained. It is difficult to conceive words that could more clearly express that the power of leasing intended to be given is a power to be exercised with reference to the whole of the lands vested in the trustees, by that act. The Earl of Shrewsbury for the time being is tenant in tail of the whole of the settled estates. The grasp of the settlement is never relaxed until something else is substituted for it. The 2d section provides that the moneys to arise from any sales to be made in pursuance of the act shall be paid into the Bank of England, in the name and with the privity of the accountant-general of the High Court of Chancery, to be placed to his account there, "Ex parte the purchasers of the *settled estates* of the Right Hon. John Earl of Shrewsbury." This is hardly consistent with the argument of the plaintiffs, that that which is to be sold has already ceased to *664] be part of the "settled estates" of the Shrewsbury family. Then, the 5th section provides, that, until sale, the estates are to be enjoyed as before the passing of the act. The 11th section enacts that the power of leasing contained in the 6 G. 1, shall be and the same is thereby repealed. The 12th section gives to the person in possession of the settled estates a power of leasing all or any of the lands (except Alton Towers) for twenty-one years, in possession, at the best and most improved yearly rents that can be reasonably had or gotten for the same, without fine, premium, or foregift, or anything in the nature thereof. The 13th section in like manner gives power to accept surrenders of leases granted under the power of leasing in the 6 G. 1, c. 29, and to grant new leases for sixty years from the date of the surrendered lease, at the same rent, and without fine or premium, &c. Then comes the important section, viz. s. 33,—"It shall be lawful for the said John Earl of Shrewsbury during his life, and, after his decease, for all and every other persons and person to whom the said manors, hereditaments, and premises limited by the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, are by the same settlement and act respectively limited successively as *aforesaid*, as and when they shall respectively *by virtue of the limitations aforesaid* be in the actual possession or entitled to the receipt of the rents and profits of the lands which for the time being shall stand limited and settled by virtue of or under the said indenture of the 81st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, or any of them, or by virtue of or under or by means of any purchase, exchange, or partition, or any act or acts for enclosure, or otherwise howsoever, to such of the uses limited by the

said indenture of *the 4th of March, 1718, and the said act of 6 G. 1, respectively as aforesaid, as shall then be subsisting or [*665 capable of taking effect,"—"to demise or lease *all or any part or parts of the same lands*, except such parts of the same lands in the county of Stafford as lie to the north of the river Churnett, together with the buildings thereon, if any, for any term or number of years not exceeding ninety-nine years, in possession, to any person or persons whomsoever who shall be willing substantially to improve or repair any of the present or any future houses or buildings upon any part of the same lands, or to erect and build any house or houses or other buildings in lieu or stead thereof," &c.; "so as in every such lease or demise there be reserved and made payable (except in the cases where peppercorn rents may be reserved according to the provisions hereinafter,—s. 35,—contained) the best yearly rent that can be reasonably had or gotten for the same, to be made payable half-yearly or oftener; and so that every such lease or demise be made without taking any fine, premium, or foregift, or anything in the nature thereof, for or in respect of making the same." The clause then goes on to provide that the lease shall contain all the usual covenants and conditions, and a proviso for re-entry for breach. The contention on the part of the plaintiffs upon this section has been, that John Earl of Shrewsbury at the time he granted the lease in question was not in possession of Oxton "by virtue of the limitations aforesaid," and that Oxton did not at this time stand limited to the uses of the settlement of 1718 and the act of 6 G. 1. That, however, is a fallacy. John Earl of Shrewsbury *was* in actual possession of Oxton under and by virtue of the limitations aforesaid. Whether he had the legal estate or not, is immaterial. He clearly was not a trespasser. The legal estate, no doubt, was in the *trustees: but they had no right to the [*666 possession or the profits of the land. The fee-simple was in them merely to enable them to make a title to a purchaser. It must always be borne in mind that this act of parliament, which is evidently drawn with much care and forethought, was drawn with the full knowledge that the power of sale contained in the act of 1803 had altogether failed to be carried into effect. Hence the necessity of a power of leasing as a convenient mode of enjoying the property in the meantime.

Manisty, Q. C., in reply.—The state of things which existed in 1803 as to Oxton continues to exist at the present time, save inasmuch as it is affected by the act of 1843. Much, therefore, of the argument on the part of the defendants is wholly inapplicable. It is incontrovertible that the lands in Oxton still remain vested in the trustees for sale, freed and exempted from all limitations, charges, and powers, save and except the power of leasing which then existed. Although new powers of leasing are introduced by the act of 1843, these were not intended to affect the trusts created by the former act. These remain intact, and must be executed if the trustees are called upon to execute them. At the time of the passing of the act of 1853, Oxton was not one of the estates which were settled to uses still subsisting and capable of being carried into effect under the indentures of 1718 and the act of 1720: and it was obviously to those only that the act of 1843 was intended to apply. John Earl of Shrewsbury could not at the

time of granting this lease be the person entitled to the lands by virtue of the limitations in the settlement. All he was entitled to, was, the perception of the rents and profits until the trusts for sale should be carried into effect. This is plain from the 7th section of the act *667] of 1803; *and even more so from the 5th section of the act of 1843. By s. 3 of the act of 1843, the premises to be purchased in substitution for those vested in the trustees for sale, were to be "conveyed, settled, and assured to the uses, and with, under, and subject to the powers, provisos, conditions, limitations, restrictions from alienation, declarations, and agreements, to, with, under, and subject to which the said manors or lordships and other hereditaments hereby vested in trust as aforesaid would have stood limited and settled if the same had not been so vested in trust as aforesaid, or as near thereto as the nature of the estates to be purchased, and other circumstances, will admit." [MONTAGUE SMITH, J.—What effect do you give to the words in the 1st section of the act of 1843, "subject and without prejudice to any lease or leases which may have been made under the power of leasing *hereinafter contained?*"] That is explained by section 13, which I have already adverted to, and which provided for the surrender of leases made under the old leasing power, and the granting of new leases in lieu thereof, which might very well apply to Oxton. The foundation upon which the argument on the part of the plaintiffs is based, is this, that the trusts created by the act of 1803 remain, and that the language of the leasing power in the act of 1843 is essentially different from that contained in the former act. The 7th section of the act of 1843 regards those persons only as being in possession, who would have been entitled to be in possession by virtue of the limitations before referred to, if that act had not passed. If the power of leasing had been intended to apply to the lands vested in the trustees for sale, it would have been so stated in plain terms: it would not have been left to inference or conjecture. The mention of Oxton in reference to the power to grant mining leases in s. 40 was *668] palpably an *oversight: and no substantial argument can be founded upon it.

ERLE, C. J.—I am of opinion that the defendant is entitled to judgment. A lease was granted on the 2d of February, 1851, by John Earl of Shrewsbury, to the defendant Beazley, pursuant to the power contained in the 33d section of the Shrewsbury Estate Act, 1843 (6 & 7 Vict. c. 28), of lands in Oxton, in the county of Chester; and the defendant is entitled to succeed if that is a valid lease.

The history of this property, so far as is material to the present question, is, that large estates were settled in 1720 upon the persons who should take the Earldom of Shrewsbury: and Oxton was included in the estate so settled. In the year 1803, the act of 43 G. 3, c. 40, passed, by which certain portions of that estate were, in the language of the act, exonerated from the uses imposed in 1720, and vested, in trustees in trust for sale: and s. 7 of that act enacted, "that in the mean time and until the said manors, messuages, farms, lands, tenements, hereditaments and premises thereby directed to be sold, should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents, issues, and profits thereof should be had, received, and taken by and be ap-

plied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively in case this act had not been made."

It is material to consider what is the right by which the Earl of Shrewsbury for the time being takes the lands in Oxton which were so exonerated from the uses of the settlement of 1720, and vested in trustees for a given purpose, but, subject to those trusts, to be [*669 *possessed by him. In my opinion, he has possession of Oxton by virtue of the uses in the settlement of 1720, in this sense, that he takes it under the statute of 1803; but that statute refers to the settlement of 1720, and requires the person claiming possession of the lands vested in trustees for the purpose of sale under the statute of 1803, to prove that he would have been entitled by virtue of the settlement of 1720 if that statute had not intervened, and that he is now entitled by virtue of the settlement of 1720, subject only to such rights as are interposed by virtue of that statute. If any person were claiming possession of Oxton as against the Earl of Shrewsbury for the time being, the right of the claimant as against the earl would be determined by referring to the settlement of 1720, and ascertaining who by virtue of that settlement would have been entitled, if the statute of 1803 had not passed. He takes, therefore, in one sense, possession of Oxton by virtue of the uses of the settlement of 1720. So matters stood until the year 1843, when it was found expedient to sell certain outlying portions of the property, and to invest the proceeds in other lands which should make a more compact estate around the grand mansion-house of the Earls of Shrewsbury: and therefore, as there was a schedule including Oxton, and including land in various other parishes, in the statute of 1803, so again, for the same purpose, there is a schedule of lands to be sold by virtue of the statute of 1843. That was one purpose of the act of 1843. But it appears to me to be clear, from the perusal of that statute, that the proprietor of these estates obtained from parliament in 1843 several other powers applicable to the whole of the Shrewsbury property, and in particular the leasing power granted by s. 33; and that leasing power, as I understand the section, extends not only to the lands which *are unaffected [*670 by the statute of 1803, but also to the lands that were taken out of settlement and vested in trustees for the purpose of sale in 1803, and also to the lands in the parishes mentioned in the schedule to the statute of 1843, which are again exonerated from the uses of the settlement of 1720, and vested in trust for the purpose of sale, and, subject to that trust, to be possessed by the Earls of Shrewsbury. Several parts of this statute relate to the whole of the estates settled in 1720, of which the Earls of Shrewsbury are in possession by virtue of the powers of that settlement, as modified and explained by what I have already said.

I now take s. 33, which enacts that "it shall be lawful for the said John Earl of Shrewsbury during his life, and, after his decease, for all and every other persons and person to whom the said manors, hereditaments, and premises limited by the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, c. 29, are by the same settlement and act respectively limited successively as aforesaid, as

and when they shall respectively by virtue of the limitations aforesaid be in the actual possession or entitled to the receipt of the rents and profits of the lands which for the time being shall stand limited and settled by virtue of or under the said indenture of the 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, c. 29, or any of them, or by virtue of or under or by means of any purchase, exchange, or partition, or any act or acts for enclosure, or otherwise howsoever, to such of the uses limited by the said indenture of the 4th of March, 1718, and the said act of the 6 G. 1, c. 29, respectively, as aforesaid, as shall then be subsisting or capable of effect, &c., to demise *671] or lease all or any part or parts of the same lands, except, *&c., together with the buildings thereon, if any, for any term or number of years not exceeding ninety-nine years, in possession, to any person or persons whomsoever who shall be willing substantially to improve or repair any of the present or any future houses or buildings upon any part of the same lands, or to erect and build any house or houses or other buildings in lieu or stead thereof or in addition thereto, or to erect and build any house or houses or other buildings on any part of the said lands whereon no buildings shall be then standing," &c. Now, in my opinion the Earl of Shrewsbury is a person in possession of the lands in question by virtue of the limitations in the settlement of 1720. Subject to the power of sale in the trustees, his possession is by virtue of the limitations in the settlement of 1720; and they are subsisting and capable of taking effect, inasmuch as they give him a right to the possession of the property. Then, there is an absolute power in him to demise any part of the land which he is entitled to. I would observe, in reference to the decision we came to yesterday in the case of *The Earl of Shrewsbury v. Keightley*, ante, p. 606, that the power of leasing here is for the benefit of the remainder-man. It is clogged with a condition that the best rent that can be reasonably had shall be reserved, and without fine, premium, or foregift, &c. It is a totally different power from that of the statute of 1720,—a power to lease at the ancient rent. I think section 33 applies to the whole of the Shrewsbury estates of which the earl shall get possession by virtue of the settlement. The whole context of the statute is to my mind remarkably confirmatory of that construction, because exception is made at different times of the parts which were taken out of settlement in 1803 and in 1843. In the very first section, in the recital of the expediency of selling *672] *the outlying portions of the estate in the counties of Oxford, Chester, Salop, and Worcester, and purchasing other estates more contiguous to the main property, it is said that it would be for the benefit of the earl and those who might succeed, if the said last-mentioned manors or lordships, messuages, farms, lands, tenements, and other hereditaments were vested in trustees, in trust to sell the same, with a provision for investing the money to arise thereby, under the direction of the Court of Chancery, in the purchase of other manors, lands, or hereditaments in the said counties of Oxford, Chester, Salop, Worcester, Stafford, Berks, and Derby, or some or one of them, to be settled to the uses and under the restrictions which should be subsisting or capable of taking effect in the settled estates not vested

by the 43 G. 3, c. 40 (the act of 1803), or by that act, in trust for sale. It there contemplates the whole of the Shrewsbury property, excepting out of the term "the said settled estates," the estates vested by the 43 G. 3, or by that act, in trustees to be sold. The reason for that exception would be apparent.

Then we come to the jointuring power. Section 7 gives a larger power of jointuring than that contained in the 6 G. 1, on all the Shrewsbury estates; but it is to be subject and without prejudice to any lease or leases then subsisting, and to any lease or leases which should have been granted under any of the powers of that act; and then comes an exception, "other than and except the said hereditaments set forth and described in the schedule annexed to the 43 G. 3, c. 40, and the said hereditaments set forth and described in the second schedule annexed to this act." The jointuring power, therefore, will apply to the estates which shall be purchased in lieu of those; and that jointuring power is not to extend to the lands in Oxton, which are described in the schedule to the act of 1803, *nor to the lands described in the second schedule to the act of 1843. They are [673] excepted. The same observation applies to s. 14, which gives a power to grant annuities for younger children, which are to be "charged and chargeable upon all or any part of the said manors and other hereditaments settled for the time being as aforesaid, other than and except the said hereditaments set forth and described in the schedule annexed to the 43 G. 3, c. 40, and the said hereditaments set forth and described in the second schedule to this act." In these two instances there is that express exception.

I now come to the other leasing clauses. Section 12 is the one which applies to leases for twenty-one years. It enacts that "it shall be lawful for the said John Earl of Shrewsbury during his life, and, after his decease, for all and every other persons and person to whom the said manors, hereditaments, and premises limited by the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, c. 29, are by the same settlement and act respectively limited successively as aforesaid, as and when they shall respectively by virtue of the limitations aforesaid be in the actual possession or entitled to the receipt of the rents and profits of the manors and other hereditaments which for the time being shall stand or be limited and settled by virtue of or under the indenture of the 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the indenture of the 4th of March, 1718, and the said act of 6 G. 1, or any of them, or by virtue of or under or by means of any purchase, exchange, or partition, or any act or acts for enclosure, or otherwise howsoever, to such of the uses limited by the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, respectively, as aforesaid, as shall then be subsisting or capable of taking effect," &c., "to demise or *lease any part or parts of the same manors [674] and other hereditaments (*except the mansion called Alton Towers, in the township of Farley, in the county of Stafford, and the outhouses, gardens, ponds, parks, woods, and premises usually enjoyed with the said mansion*), to any person or persons, for any term or terms of years absolute not exceeding twenty-one years, to take effect in possession, and not in reversion or by way of future interest,"—reserving the

best rent, and taking no premium, and with the usual covenants for the benefit of the remainder-man. The person who drew this act of parliament took remarkable care when he used the words "the said settled estates" in the wide sense I before mentioned, to make exceptions whenever the need was. The exception in that section is not of the lands contained in the schedule to the act of 1803, nor of the lands described in the second schedule to the act of 1843, but it is of the mansion of Alton Towers and the property usually occupied and enjoyed with it.

The 13th section gives the same persons power to accept surrenders of leases granted under the power of leasing contained in the act of 1803 (6 G. 1, c. 29), other than and except the leases specified in the schedule to the act of 1843, and to demise the premises to the person or persons making the surrender for any term of years absolute, in possession, not exceeding the term of sixty years from the date of the surrendered lease, reserving the same rents, without taking any fine, and with a proviso for re-entry for non-payment of rent, &c. That is entirely a separate power, and need not turn upon the argument as to the construction of s. 33.

It appears to me that the whole tenor of this statute,—dealing with "settled estates" in the way I have explained,—is, to give the earl for the time being power to demise the lands in Oxton. The argument *675] that the lands in Oxton are exonerated from the uses of the settlement of 1720, and so not within section 33, would say that lands described in the second schedule of the act of 1843 are exonerated from those uses. But it is clear to my mind that section 33 gives authority to demise the lands described in that schedule, because the 1st section, creating the power of sale, expressly excepted leases granted under this statute: and I should say, with respect to the argument as to the lands described in the schedule to the act of 1843, that they are just as much exonerated from the uses of the settlement of 1720, as the lands which were described in the schedule to the act of 1803. They stand alike; and it is clear to my mind that the leasing power conferred by section 33 extends to the lands to be sold under the statute of 1843: and I see no objection to its extending also to the lands exonerated from the uses of the settlement of 1720 by the statute of 1803.

Does the statute of Victoria (1843) under "the settled estates" include the lands in Oxton? Section 40 gives to the Earl of Shrewsbury for the time being a power just of the same description, to demise or lease all or any of the mines and minerals, whether opened or otherwise, in, under, or upon all or any part or parts of the same lands situate, amongst other places named, in the township of Oxton. It is said that that township is there mentioned by mistake. But I am very certain that the statute is drawn with intense care and skill, and that it was intended to give the power of granting mining leases in and under the lands in Oxton.

I give this judgment without any doubt or misgiving, seeing that the rights of the remainder-man are fully protected. The words of the statute are to my mind perfectly clear and consistent to the effect *676] I have mentioned, when the whole of its provisions are read together.

WILLES, J.—I am of the same opinion. I think the conclusion at which the court has arrived is entirely in accordance with what one might expect would have been the provisions made in the year 1843, considering what we know of the history of this property. Down to that period, the only leasing power which existed was that which is to be found in the statute of 6 G. 1, c. 29, which was an act passed under very peculiar circumstances. It was passed for the purpose of securing to a Roman Catholic family, notwithstanding the existence of the penal laws then in force against persons of that persuasion, the possession of their property: and they, as part of the price of the security they thus obtained, agreed that there should be no opening out of the entail created by the statute, except by an heir (an earl) who should be a protestant. So that, until the passing of the act of 1843, it was competent to any Earl of Shrewsbury who might inherit the property under the limitations contained in the statute of 6 G. 1, being a protestant, to cut off the entail, and so to defeat the subsequent remainders. Accordingly, it is not astonishing to find in that act a power of leasing which to a great extent enabled the successive earls to receive by way of fine or foregift upon the renewal of the leases the benefit that might accrue from the improved value of the property: and the power of leasing contained in the statute of 6 G. 1, is one which did not allow the persons who successively came into the enjoyment of the property under the limitations contained in that act, upon the failure of the elder branch, to anticipate and enjoy from time to time so much of the corpus of the property as might be represented by the worth of a lease *for the period allowed by the 10th section, "at the ancient and accustomed rent," which [*677 might be,—and in one instance, we have seen, was,—less than the actual value of the property. For that reason, and because of the omission of any reference to the power given by the act of 6 G. 1, or to any new power consistent with the sale of the corpus of the property so as to convert it as it stood in 1803 (at the time of the passing of the 6 G. 1) into money; so that the whole of that money should be laid out in lands to be settled to the same uses as affected the land under the act of 6 G. 1. For that reason it was that the court was compelled to hold in Keightley's Case, *antè*, p. 606, that the lease was void; because, to imply a power to make a lease, under the 10th section of the 6 G. 1, of lands which had come under the operation of the act of 1803 (43 G. 3, c. 40), would be to hold that a portion of the corpus of the property which was to be sold by the trustees, and the proceeds of which were to be applied to the uses pointed out by that act, might also be anticipated and acquired by the tenants for life under the power.

So stood matters until the passing of the act of 1843, 7 & 8 Vict. c. 28. The speedy sale which was anticipated in 1803 of the land subject to the act of that year, did not take place. All the property appears to have very greatly improved in value within the ensuing forty years: and in 1845 was passed an act of parliament having considerable effect upon the family estates, and which led to consequences which could not be foreseen. That act appears to me, so far as language can express an intention, to have been intended to deal with the whole of the property, to have been intended, with regard to the

powers given by the act, where those powers were not expressly excepted, to apply to all the property which formed part of the *678] *Shrewsbury estates, whether that property might remain strictly subject to the limitations of the act of 6 G. 1, or whether a portion of it might be sold, by reason of its being desirable with a view to consolidate the estates, and the purchase-money be applied to the acquisition of other lands lying more contiguous to the bulk of the property,—that the whole estate should be subject to such powers. When one comes to consider the question, one naturally looks to see what these powers are,—whether they are powers which would interfere with the object which the act had in view, if exercised over the lands to be sold by the trustees, or whether they are not powers which would rather advance the object of the act; especially if the same delay took place in proceeding under the act of 1843 as had taken place in the contemplated sales under the act of 1803.

As my Lord has already fully pointed out the principal provisions of the act, I will content myself with referring to them very shortly. The powers of the act of 1843 are not powers which allow the persons in possession of the property from time to time to anticipate any portion of the income: but they are powers which enable them to make leases for the benefit of the persons who shall from time to time enjoy the property, whether they be persons taking under the conjoint effect of the statute of the 6 G. 1 and of the act of 1803, or of the act of 1843; and whether they are the persons who are entitled to the enjoyment of the estates being tenants in tail from time to time, or whether they are persons who had purchased from the trustees under the provisions of the two later acts. To purchasers, of course, it could make no difference, because the fact of the existence of the lease would be taken into account in ascertaining the purchase-money they would be willing *to give. To the person *679] enjoying the estate, it might make every difference, because the property might get into a ruinous and dilapidated state by being out of lease, and the value to the person who would be entitled to the property obtained in exchange might thus be greatly deteriorated; whilst the remainder-man or heir-in-tail coming in from time to time would not, for the reason already mentioned, be prejudiced by a lease being made. All the arguments, therefore, founded upon convenience are in favour of the assumption that these powers, even if the language be ambiguous, are powers which apply to the whole of the property. But I am of opinion that the language is not ambiguous. On the contrary, I think it is clear and intelligible; and that, when we come to compare the language used in the section on which our judgment must mainly turn,—the 33d section of the act of 1843,—with the language used in the other portions of the act, which were meant to apply to estates with the exception of those in question, the language which was sufficiently clear at first becomes still clearer. The 33d section clearly does apply to all the lands which were within the settlement made by the act of 6 G. 1, whether they were subsequently, for the benefit of the estate, temporarily severed from it or not. Now, the 33d section amounts to this, that the power of leasing is to be exercised by the persons and person who from time to time should enjoy the property by virtue of the settlement of 1718 and

the act of 6 G. 1. It then proceeds to deal with lands which may have been obtained by purchase or exchange, &c. But I am satisfied to take the construction which is most favourable to the plaintiffs, and that gives the power of leasing to the person who shall from time to time enjoy by virtue of the settlement made by the act of 6 G. 1. I am clearly of opinion that the person who made this *lease was [*680 in possession and enjoyment of the property by virtue of the settlement of the Duke and the act of 6 G. 1, and that without that settlement and that act he could not have enjoyed it at all. By reason of that settlement, and by reason of that act, he is the person designated thereby; and the resulting trusts expressed in the 7th section of the act of 1803 and the 5th section of the act of 1843 were resulting trusts in his favour. He was entitled to the temporary enjoyment of the estates until they were sold; and he was entitled to the benefits which could be derived from selling or exchanging them, or from the lands purchased with the proceeds, which came immediately under the settlement of the 6 G. 1. Who else took under that settlement? How otherwise any one could take under that settlement, has not been suggested. Now, as my Lord has pointed out, these words are the very words used in the power of jointuring,—s. 7, and in the power of charging the estate for the benefit of younger children,—s. 14. Those powers, by the express language of the act, are not to affect lands which are vested in trustees under the acts of 1803 and 1843; and those lands are taken out of the language which is used in s. 33 in describing the person who is to lease and the lands which are to be leased, by words of exception,—“other than and except the hereditaments set forth and described in the schedule annexed to the act of 43 G. 3 (1803), and the hereditaments set forth and described in the second schedule annexed to that act,”—the act of 1843. Therefore you have not only language which in my judgment is sufficient to describe the person who enjoys for the time being, which describes no other person and no other lands, but you have two legislative expositions of those words as including such persons and such lands, but for an express exception, in the same act of parliament. You have *then that fortified by the fact, that, in one of those [*681 powers other than that in which it is used, referring to the language of the first section, you have land expressly mentioned which was in the schedule to the act of 1803. So much for the body of the act, and so much for the character of the transaction itself as throwing light upon the language used.

But I apprehend we have another key to the intention of the legislature, because we have a recital very carefully framed, which shows distinctly, as it appears to me, what that intention was,—the recitals in an act of parliament being, as Lord Coke says, “the key to open the meaning of the act,” and which moreover, as he observes, may enlarge though it cannot restrain the enacting part. Passing over the general description of the settled estates, and of the uses, and of the act passed for settling them, 6 G. 1, c. 29, showing that they were from the beginning spoken of as “the settled estates,” we come to the bottom of p. 725 of the printed copy of the act of 1843, where we find the whole property twice described as “the said settled manors, hereditaments, and premises,” and “the said settled estates.” Next,

We find a recital that "it would be for the benefit of the said John Earl of Shrewsbury and those who may succeed to the *said settled estates*, "if the outlying portions of the estate were vested in trustees in trust to sell. Here, you have the expression "settled estates" with an exception, expressed in other words, it is true, but equally an exception with those which have been mentioned with reference to the powers of jointuring and of making charges for younger children; and you have the very language which was argued to have a limited effect in section 33,—"*settled to the uses and under the restrictions which shall be subsisting or capable of taking effect in the settled* *682] *estates not vested by the 43 G. 3, c. 40, or by this act, in trustees, to be sold.*" You have, therefore, in the recital an exception on that portion of the act which deals with the estate,—excepting the estates which it is insisted on the part of the plaintiff are excepted here. The recital then goes on to state, that, in consequence of the great increase in the annual value of the "settled estates" since the 6 G. 1, it was reasonable that the power of jointuring should be extended. It then proceeds to state that it would be for the benefit of the then earl and those succeeding to the "settled estates," if the existing power of leasing were repealed, and the earl and the successive takers were enabled to grant leases in possession, at rack-rent, for any term not exceeding twenty-one years, and also building leases and mining leases; and no such exception is introduced as is found in the previous part of the recital, when it was intended to exclude lands part of which was demised by the lease in question.

I must own that these considerations bring demonstration to my mind that the power contained in the 33d section was well and lawfully exercised by the granting of the lease in question, and consequently that our judgment should be for the defendants.

BYLES, J.—I am of the same opinion, but not without some apprehension that I may not have fully understood the case, because, in the view I take of it, I think it a perfectly clear case. The 18th paragraph of the special case states that the lease of the 2d of February, 1851, was made in conformity with the power contained in the act of 1843, that is, the 6 & 7 Vict. c. 28. It may be observed that this lease is a lease which is perfectly consistent with the power in the trustees to sell the land for the best price that could be got for it, *683] because it was a lease in respect of which **no premium or foregift was taken.* Now, the argument of Mr. Manisty, if I rightly understood it, was this, that, in the 1st section of the 6 & 7 Vict. c. 28, is a provision analogous to that which was contained in the 43 G. 3, c. 40, that a portion of the lands which were settled by the 6 G. 1, c. 29, and made a part of the Earl of Shrewsbury's estates for ever, viz. the lands in the second schedule, should be vested in the trustees, "freed and absolutely acquitted, exempted, exonerated, and discharged of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements in and by the indenture of the 31st of October, 1700, the will of the said Charles Duke of Shrewsbury, the indenture of the 4th of March, 1718, and the said act of 6 G. 1, respectively created, limited, provided, and declared of and concerning the same manors, messuages," &c. Now, it is plain that all that was necessary, in order to give

effect to that provision, was this, that the trustees acting under that power of sale should be able to make a good title to a purchaser, and that, so far as the title of a purchaser is concerned, and so far as is not otherwise provided by the act, all the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements before mentioned should be wiped out. But, what is to be done in the meantime? We are told in the last case, that, under a somewhat similar power contained in the former act, the lands had remained unsold for forty years. This fact was known to the person who drew this act of parliament: and one would suppose that he must have contemplated that something would have been done in the meantime. I should have imagined, without any words to that effect, the beneficial interest in the meantime would remain in the person to whom the estate was limited. But that is not left to conjecture, *because [*684 s. 5 of this act, which nearly follows the words of the 7th section of the former act, in express terms provides, that, "in the meantime and until such sale or sales as aforesaid, the said manors and other hereditaments thereby vested in trust as aforesaid, or the unsold part or parts thereof for the time being, shall be held and enjoyed, and the rents, issues, and profits thereof be had, received, and taken by and for the benefit of such person or persons as would have been entitled thereto and ought to have held and enjoyed the same in case the same premises had not by this act been so vested in trust as aforesaid." Now, how did John Earl of Shrewsbury and the other owners of this estate hold, except by virtue of this 5th section? That section gives them a beneficial interest; probably also it may give them a legal interest: but it is immaterial to consider that here. The estate is by the 1st section given to the trustees to sell "subject and without prejudice to any lease or leases which may have been made under the power of leasing hereinafter contained." I read those words "which may have been made," as if they had been, "which shall have been made,"—that is, any leases which should thereafter be made under the power of leasing thereafter contained. Those persons, therefore, who are to enjoy in the meantime under the limitations in the statute of 6 G. 1 have a leasing power, which is contained in the 33d section. Mr. Manisty says that the persons who are to exercise that power under s. 33 are not entitled "under and by virtue of the limitations aforesaid." It seems to me,—though not without some doubt whether I fully understand the question,—for the short reason I have given, that they are persons who are so entitled.

MONTAGUE SMITH, J.—I am of the same opinion. I *think [*685 the words of the 33d section of the 6 & 7 Vict. c. 28, construed by the surrounding circumstances and by the language of other parts of the act, included the lands vested in the trustees for sale. The 1st section, in addition to the inference to be derived from the preamble, to which my Brother Willes has so fully referred, shows beyond all doubt an intention that the lands vested in the trustees for sale should be subject to some leasing powers. The trustees are to sell "subject and without prejudice to any lease or leases which may have been made under the power of leasing hereinafter contained." If the lands vested in trustees to be sold under this act are subject to the leasing power, what reason is there for supposing that the lands in

Oxton were not subject to the leasing power also? Mr. Manisty contends that those words would be satisfied by referring them to the power given by the 13th section of the 6 & 7 Vict. c. 28, which is a power to John Earl of Shrewsbury, or any other person to whom the lands limited by the indenture of the 4th of March, 1718, and the act of 6 G. 1, c. 29, are by the same settlement and act respectively limited as aforesaid, as and when they shall respectively "by virtue of the limitations aforesaid" be in the actual possession, &c., to accept surrenders of leases granted under the power of leasing in the 6 G. 1, c. 29, and to grant new leases for sixty years, reserving the ancient rents. But, why should it be so limited? That, taken by itself, is not aptly described as a leasing power: it is a leasing power and something more. It is said that the language of the 13th section differs from that of the 12th section, which gives a power of leasing for twenty-one years. The words of that section are precisely the same as those of the 33d section. Then, the 13th section, instead of repeating all the words of the 12th section, refers to the settlement in *686] this way, "by virtue of the *limitations aforesaid," those limitations being described at length in the section immediately preceding. There are four leasing powers in this act,—a power to lease for twenty-one years (s. 12) at the best or most improved yearly rent, without taking any fine, premium, or foregift,—a power to accept surrenders of leases granted under the power of leasing in the 6 G. 1, c. 29, and to grant new leases for sixty years (s. 13), at the same rent as was reserved by the surrendered lease,—a power to grant building-leases for ninety-nine years (s. 33),—and a power in s. 40 to grant mining leases. Why should s. 13 be referred to alone as the clause to which the exception in s. 1 points? Referring to the surrounding circumstances, which we are at liberty to do in construing an act of parliament, there is every reason to suppose that it was the intention to give this power. It certainly was most expedient so to do; for, it might well be supposed that a considerable period would probably elapse before sales could be effected. Indeed, there had been an interval of 40 years since the previous act, and the Oxton property still remained undisposed of. No doubt, the inconvenience of a want of power of leasing those estates while remaining unsold had been felt.

For these reasons, it appears to me, that, subject to the exception already referred to, there is in this act a power of leasing all the lands, whether vested in trustees for sale or not. The framers of the act took care, that, in the leases to be granted, there should be no provision to deteriorate the inheritance, as there was under the old power which we held not to apply to the estates vested in trustees for sale under the act of 1803. On the whole, I have come to the clear conclusion that the defendants are entitled to judgment.

*687] WILLES, J.—I would add that the 13th section does *not seem to me to present any difficulty. It appears to me that that section was intended to apply to an objection that might be made that the leases described in and authorized by s. 13 were leases in reversion. It was not to give a power, but to remove an objection.

Judgment for the defendants.

SHUTTLEWORTH v. LE FLEMING and Others. July 10.

The statute 2 & 3 W. 4, c. 71, does not apply to easements or profits à prendre in gross, *e. g.* to a claim of "a free-fishery" in the waters of another.

THE declaration stated that the defendants broke and entered a certain close of the plaintiff, being part of certain lands called the Low Bank Ground Estate, and landed and brought into and upon the said close certain fishing-nets, and thereby and therewith damaged the grass of the plaintiff there then growing: Claim, 20*l*.

Fifth plea,—that, at the said time when, &c., the said close adjoined and was, and the same now is, part of the shore of the said inland lake or water called Coniston or Thurston Water, and that the defendant Hughes Le Fleming and all his ancestors whose heir he is, for *sixty years* before this suit enjoyed as of right and without interruption a *free-fishery* in the said water, with the right of landing and bringing their fishing-nets into and upon any part of the shore of the said water, as to the said free-fishery appertaining: and that the defendant Hughes Le Fleming, and the other defendants as his servants and by his command, did what is complained of in the lawful and reasonable use and exercise of the said right, and not otherwise.

*The sixth plea was the same as the fifth, substituting [*688 "thirty years" for "sixty years."

Mellish, Q. C., for the plaintiff.(a)—The question is whether a right in gross can be claimed under the Prescription Act, 2 & 3 W. 4, c. 71. How can actual user by A. prove a right in his ancestors? [WILLES, J.—In *Ackroyd v. Smith*, 10 C. B. 164 (E. C. L. R. vol. 70), this court held that a right of way could not be claimed in gross.] If this had been a claim of a several fishery, it would have been clearly bad; for, it cannot be prescribed for. The statute applies only to cases where there is a servient and a dominant tenement. The 1st section recites, that "whereas the expression 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many *cases productive of inconvenience and [*689 injustice:" it then proceeds to enact "that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the King,

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the statute 2 & 3 W. 4, c. 71, does not apply to easements or profits à prendre in gross: *Welcome v. Upton*, 6 M. & W. 536; *Baily v. Stephens*, 12 C. B. N. S. 91 (E. C. L. R. vol. 104):

"2. That a free-fishery is not a profit à prendre, not being an incorporeal hereditament:

"3. That the right of landing and bringing nets upon any part of other men's lands adjoining the water, cannot be deemed an easement or incident annexed to a right of free-fishery; for that an easement, as such, can only be claimed as accessory to corporeal property:

"4. That the fifth and sixth pleas, although apparently pleaded with reference to the statute 2 & 3 W. 4, c. 71, are not such pleas as are warranted by that statute, as they allege enjoyment for the prescribed periods, not by occupiers, but by the defendant and his ancestors, and yet do not claim by prescription or grant."

his heirs or successors, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit, shall have been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and, when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." The 2d section relates to claims of rights of way or other easement, or to any watercourse, or the use of any water; and the 3d to claims to the use of light. The 4th section enacts "that each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced *690] in for one year after the party interrupted *shall have had or shall have notice thereof, and of the person making or authorizing the same to be made." The 5th section is material: it enacts, "that, in all actions upon the case and other pleadings wherein the party claiming may now allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and, if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that, in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done: and, if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." That throws considerable light upon what was intended by the 1st section. The claim is to be made in the right of the occupier, instead of in that of the owner of the fee. [BYLES, J.—Section 1 applies to all rights which may be claimed either by custom, by prescription, or by grant.] This clearly is not a case in which the judge would be

*warranted in telling the jury that they might presume from the mere fact of user a grant to a man and his heirs. If [*691 this could be, a man's estate might be burthened with claims of which he could have no notice. [BYLES, J.—The real question is, whether the statute is applicable to such a claim.] In *Welcome v. Upton*, 3 M. & W. 536, where the question was, whether a right of pasturage in gross was within the 5th section of the Prescription Act, Parke, B., said: "If the only question in this case had been whether a right of common in gross be within the statute 2 & 3 W. 4, c. 71, s. 5, we should probably have granted a rule for the purpose of giving that question further consideration, although we might be disposed to think that the present case is within the equity of the statute. But, if the first plea be good, the determination of that question becomes immaterial. The first plea claims a prescriptive right in Thomas Brereton and his ancestors, and in his and their heirs and assigns, of sole and several pasturage in the close in question. That plea is good. It is laid down in Co. Litt. 122, that a party may prescribe to take the sole and several herbage; and, although this was doubted in *North v. Cox*, 1 Lev. 258, it was afterwards established as law by the cases of *Hoskins v. Robbins*, Pollexf. 13, and *Potter v. North*, 1 Ventr. 383. The word 'assigns' in the plea may be rejected as insensible." [BYLES, J.—In Com. Dig. *Piscary* (A), it is said "A piscary is the liberty of fishing in the water of another: and this liberty may be claimed by grant or prescription." The real question is, whether the statute is applicable to such a claim.] The matter was a good deal considered by this court in *Bailey v. Stephens*, 12 C. B. N.S. 91 (E. C. L. R. vol. 104), where it was held that a claim of a prescriptive right in the owners or occupiers of close A. to enter close B. (belonging to a third person), and to cut down and carry away and *convert to their own use all [*692 the trees and wood growing and being thereon, "as to the said close A. appertaining" was void, as being too large. Willes, J., there says: "There is no doubt an easement in gross could not be claimed by an occupier under the Prescription Act, because under the Prescription Act, as has been pointed out already, the claim is by custom, prescription, or grant; and there is no doubt that a right could not be acquired under that act, by twenty, thirty, or sixty years' enjoyment, according as it might be, whether an easement or a profit à prendre, except it was capable of being annexed to land within the rule I have mentioned. But the question has arisen whether it is not possible to plead a right in gross in the manner pointed out by the subsequent section, not a section giving the right, but a section giving the mode of pleading. It is perfectly clear to my mind that it cannot be so pleaded, without showing something more than that the person is in possession as occupier; it must be shown that he is heir or assignee of the person to whom the right in gross has been granted. The mere fact of his being in possession does not show that. Therefore, notwithstanding the learned discussions that have taken place as to whether the right of an easement in gross may be pleaded in the form given under the Prescription Act, it is quite clear to my mind that nothing has passed affecting the right of prescription, and the fourth and fifth pleas are invalid." [MONTAGUE SMITH, J.—This plea is not in the form given by s. 5 of the Prescription Act. WILLES, J.—Not

is it within s. 2 "by some person claiming a right thereto." Suppose the enjoyment had been by one man alone over the whole period of thirty years,—how could that prove that he and his ancestors had it? If a man has a right of this kind at all, it is a right for ever. A *693] *grant* may be for life, or for years. If *annexed to the land, it passes with the land. The Prescription Act intended that the right should be supported by simple user: if gained at all, it is gained for ever. When the statute in s. 1 provides, that, "where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption," &c., coupling that with s. 5, it must mean, by any occupier of a dominant tenement who enjoys it as annexed to that tenement. In *Mounsey v. Ismay*, 34 Law J., Exch. 52, a claim, by custom, for all the freemen and citizens of a neighbouring city to run horse-races over certain land on Ascension Day in every year, was held not to be a claim to an easement within s. 2. The same court had previously (1 Hurlst. & Colt. 729) held such a plea, alleging it as a custom at common law, to be good: but, on the last occasion, the claim of twenty or forty years was held to be bad, because that was a case where there was no dominant tenement. [MONTAGUE SMITH, J.—That is putting a great limitation on the word custom.] Martin, B., in delivering the considered judgment of the court, in 34 Law J., Exch. 54, says: "The occasion of the enactment of the Prescription Act is well known. It had been long established that the enjoyment of an easement as of right for twenty years was practically conclusive of a right from the reign of Richard the First, or, in other words, of a right by prescription, except proof was given of an impossibility of the existence of a right from that period; and a very common mode of defeating such a right, was, proof of a unity of possession since the time of legal memory. To meet this, the grant by lost deed was invented; but, in progress of time, a difficulty arose in requiring a jury to find upon their oaths that a deed had been executed which every one knew never existed: hence the Prescription Act. The 1st section of the act *694] relates to *profits à prendre, and the respective periods therein mentioned are thirty and sixty years. The present case is not alleged to be within it. The pleas are all grounded on the 2d, which enacts that no claim which may be lawfully made at common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or to the use of any water, to be enjoyed upon any land, &c., when such way or other matter shall have been actually enjoyed by any person claiming right thereto without interruption for twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; and, when such way or other matter should have been so enjoyed for the period of forty years, the right thereto should be deemed absolute and indefeasible, unless it should appear that it was enjoyed by a consent or agreement by deed or writing. The question which has been argued before us, and which is the true one, is, whether a custom for the freemen or citizens of Carlisle, upon Ascension Day, to enter upon another man's land for the purpose of holding horse-races there, is an easement within the 2d section. To be so, it must be within the words custom, prescription, or grant, to a

way or other easement, or to a watercourse, or to the use of any water, to be enjoyed upon land of another: and we think it is not. In the first place, we do not think that this custom is an easement at all. One of the earliest definitions of an easement with which we are acquainted, is in the *Termes de la Ley*, and it is 'a privilege that one neighbour hath of another by writing or prescription, without profit; as, a way or sink through his land.' In this definition custom is not mentioned: prescription is; and it therefore seems to point to a privilege belonging to an individual, not a custom, which appertains to many as a class.' Again, *in Mr. Gale's book, p. 5, an easement is defined; a very great number of authorities are collected, and it is stated in the most [*695 explicit terms, that, to constitute an easement, there must be two tenements, a dominant one to which the right belongs, and a servient one upon which the obligation is imposed." If that be the true construction of s. 2, under the 1st section you would confine the custom to the case of two tenements, because s. 5 equally applies to both sections. "We further think," continues the learned Baron, "that the 2d section itself points to a right belonging to an individual in respect of his land, not to a class, such as freemen or citizens claiming a right in gross wholly irrespective of land; for, to obtain the benefit conferred by the 2d section, it must be enjoyed by a person claiming right thereto for the full period of twenty years or forty years. We are not aware of any case or expression of opinion by any judge contrary to this: but the 5th section of the act has been relied on as establishing it. This section relates to pleadings, and enacts, that, in all pleadings to actions of trespass, and other pleadings wherein before the passing of the act it would have been necessary to allege the right to have existed from time immemorial, it should be sufficient to allege the enjoyment thereof as of right by the occupier of a tenement in respect whereof the same is claimed, &c. It has been said that this shows that an easement within the protection of the statute must be an easement belonging to a dominant tenement: we think it affords an argument in illustration as to what the legislature contemplated: but, after what fell from this court in *Welcome v. Upton*, 5 M. & W. 398, and the same case 6 M. & W. 536, and a note of the late Mr. Henry Willes, in p. 152 of the edition of Gale on Easements edited by him, we are not prepared to say the statute may not extend to *easements [*696 in gross; although it is to be observed that all which Lord Wensleydale says in the last report of the case (6 M. & W. 542, 3) is, —'We might be disposed to think that the present case (an alleged easement in gross) is within the equity of the statute;' and he goes on to add that the question was then immaterial. But, however this may be, we are of opinion, that, to bring the right within the term 'easement' in the 2d section, it must be one analogous to that of a right of way which precedes it, and a right of watercourse which follows it, and must be a right of utility and benefit, and not one of mere recreation and amusement. In our opinion, therefore, the present alleged right is not within the language or meaning of the Prescription Act; and we are satisfied that it was never in the contemplation of Lord Tenterden, who framed it (see per Lord Wensleydale, 5 M. & W. 404), to include within the act such customary rights as

entering land to enjoy rural sports, as in *Millechamp v. Johnson*, Willes 205, n., or to dance upon a green, as in *Abbot v. Weekly*, 1 Lev. 176, by analogy to which we held this alleged customary right to run horse-races a lawful one at common law.^(a) What we think he contemplated, were, incorporeal rights incident to and annexed to property for its more beneficial and profitable enjoyment, and not customs for mere pleasure." [ERLE, C. J.—A parish may have a custom: but a parish cannot prescribe.] As far as it goes, that case puts some limitation on the 2d section of the act. [WILLES, J.—Has the case of the pew been decided?] As that must be claimed as appurtenant to a house, the case would not decide this. Then assuming that a right in gross may be claimed under s. 2, does it apply to a claim of a free fishery? [WILLES, J.—The question is whether such a right could be established by user.] What does the

*697] plea mean by a free fishery? Does it mean an exclusive right to take fish in the water in question, or a right in common with others? In a very erudite opinion delivered by Willes, J., as the unanimous opinion of the judges in the case of *Malcomson v. O'Dea*, 10 House of Lords Cases 593, 618, that learned judge says: "Some discussion took place during the argument as to the proper name of such fishery, whether it ought not to have been called in the pleadings (following Blackstone) a 'free' instead of a 'several' fishery. This is more of the confusion which the ambiguous use of the word 'free' has occasioned from a period as early as that of the Year Book of P. 7 H. 7, fo. 13, down to the case of *Holford v. Bailey*, 13 Q. B. 426, where it was clearly shown that the only substantial distinction is between an exclusive right of fishery, usually called 'common of fishery,' sometimes 'free' (used as in free port). The fishery in this case is sufficiently described as a 'several' fishery, which means an exclusive right to fish in a given place, either with or without the property in the soil." In which sense is the word "free-fishery" used in this plea? If as in free-warren, the plea is clearly bad: it could not be intended to claim it by thirty years' user. Free-fishery and free-warren import an exclusive right, for the invasion of which a man may maintain trespass, even though he has no interest in the land itself. [WILLES, J.—"Free-fishery" *prima facie* means *several* fishery.] In *Hargreave & Butler's* note to Co. Litt. 122 a, it is said: 'According to this passage, ownership of the soil is not necessarily included in a *several fishery*, and *common of fishery* and *free fishery* are the same thing. But one whose works will be admired as long as a good taste for literary compositions, or gratitude for the pleasure and instruction derived from them, shall have any influence, gives a very

*698] opposite explanation; for, according to him, ownership of soil is essential to a *several fishery*; and a *free fishery* differs both from *several fishery* and *common of fishery*; from the former, by being confined to a *public* river, and not necessarily comprehending the soil; from the latter, by being *exclusive*: 2 Bl. Comm. 8th edit. 39. But we doubt whether this distinction may not be in a great degree questionable. 1. In respect to a *several fishery*, where is the inconsistency in granting the sole right of fishing, with a reservation of the soil and its other profits? Bracton expressly takes notice of such a grant;

(a) In *Moansey v. Ismay*, 1 Hurlst. & Colt. 720.

for, his words are, that one may *servitutum imponere fundo suo quod quis possit piscari cum eo, et ita in communi, vel quod alius per se ex toto*. Bract. fo. 208 b. There are also numerous authorities for it; the old books of entries agreeing that one may prescribe for a *several fishery* against the owner of the soil: to which should be added the three cases of Elizabeth cited by Lord Coke: see Lib. Intrat. 162 b, 163 a; Rast. Ent. 597 b, &c. Nor do we understand why a *several piscary* should not exist without the soil, as well as a *several pasture*, as to which latter we have already (*suprà*, note 6) shown the doctrine to be settled. The chief reasons which occur against Lord Coke seem to be these. Several writs never applicable except to the soil, lie for piscary: such as, a *præcipe quod reddat, monstraverunt de rationabilibus devisis*, and trespass, which latter writ is particularly insisted upon by Lord Chief Justice Holt: Dav. 55 b; Hugh Comm. Orig. Wr. 11 W.; Jo. 440; 1 Ventr. 122; 2 Salk. 637; Skinn. 677. *Suum liberum tenementum* is a good plea to trespass for fishing in a *several piscary*: 17 E. 4, fo. 6; 18 E. 4, fo. 4; 10 H. 7, fo. 24, 26, 28. The soil will pass, as it is said, by the grant of a piscary: Plowd. 144. But all these objections may be repelled. The writs *relied [*699 on will not always lie for a piscary. Thus, if a *præcipe quod reddat* is brought of a piscary in the water of another person, the writ is bad, and a *quod permittat* is the proper remedy: Fitz. Abr. *Briefs* 861; Fitz. Nat. Brev. 23 I, and note (b) of the 4th edit. Besides, in the cases of actions for trespass in a *several piscary*, or at least in some of them, the writ seems in effect to state a *several piscary* in the *plaintiff's own soil*, which therefore proves nothing as to the sense of *several piscary*, without further explanation: Reg. Br. Orig. 95 b; Carth. 285; Skinn. 677. The plea *liberum tenementum* may be replied to by prescribing for a *several piscary*: see the books before cited, as to such a prescription. Though the grant of a piscary *generally* may perhaps pass the soil, yet it will not if there are any words to denote a different intention; as, where one seised of a river grants a *several fishery* in it, which is the case put by Lord Coke in another place: and much less will the soil pass when there is an express reservation of it: *antè*, 4 b, and n. (2) there. Hence, as it should seem, the arguments are short of the purpose; for, at the utmost, they only prove that a *several piscary* is *presumed* to comprehend the soil, till the contrary appears, which is perfectly consistent with Lord Coke's position, that they may be in different persons, and indeed appears to us as the true doctrine on the subject. 2. Both parts of the description of a *free fishery* seem disputable. Though, for the sake of distinction, it might be more convenient to appropriate *free fishery* to the franchise of fishing in *public* rivers by derivation from the Crown, and though in other countries it may be so considered, yet, from the language of our books, it seems as if our law practice had extended this kind of fishery to *all* streams, whether *private* or *public*; neither the register nor other books professing any discrimination: Rol. 95 b; Fitz. N. B. *88 (g); Fitz. Abr. *Assise* 422; 4 E. 4, fo. 28; 17 E. 4, fo. 6 b, [*700 7 a; 7 H. 7, fo. 13 b; Cro. Car. 554; 1 Ventr. 122; 3 Mod. 97; Carth. 285; Skinn. 677. Again, it is true, that, in one case, the court held *free fishery* to import an *exclusive* right equally with *several piscary*, chiefly relying on the writs in the Reg. 95 b, and the 43 E.

8, fo. 24. But then this was only the opinion of two judges against one, who strenuously insisted that the word *libera ex vi termini* implied *common*; and that many judgments and precedents were founded on Lord Coke's so construing it: 2 Salk. 637; Carth. 285. That the dissenting judge was not wholly unwarranted in the latter part of his assertion, appears from two determinations a little before the case in question: see Upton v. Dawkin, 3 Mod. 97, and Peake v. Tucker, cited in Carth. 286, in marg. We may add to this the three cases cited by Lord Coke as of his own time; and that there are passages in other books which favour his distinction: see Cro. Car. 554; 17 E. 4, fo. 6 b, 7 a; 7 H. 7, fo. 13 b." [WILLES, J.—A free-fishery, like free-warren, could only be granted by the Crown before Magna Charta. It has been held that a several fishery could be granted in a river not tidal; but that is called "separalis." When common of fishery is described, it is usually called *free*, by reason of everybody having a right to go there. I on this ground refused at Chambers to make the defendant state his claim with more precision.] Is a several fishery a profit à prendre within the meaning of the Prescription Act? It imports an ownership in the soil, and therefore cannot be claimed as a profit à prendre: it is an interest, and not a mere easement: Com. Dig. *Piscary* (A). By profit à prendre in the Prescription Act, is meant a profit or benefit which is to be enjoyed in common with others. For this Mounsey v. Ismay, 34 Law J. Exch. 52, is a distinct authority.

*701] *Manisty*, Q. C. (with whom was *J. A. Russell*), contra. (a)—The right set up by the pleas is one which is necessarily incident to the right of fishing: the right to fish could hardly exist apart from the right to land nets on the banks of the water. *Primâ facie* the owner of the banks would be the owner of the soil of the lake adjoining. It may be that at some former time the owner granted to A. B., his heirs and assigns, a right of fishing in the lake, with the right of landing nets on the soil of the banks, be it several or otherwise. It is a right which is recognised by the law, and which is assignable at law. Why should not such a right be gained by the Prescription Act? That it is a profit cannot be doubted. It is not like a mere personal license to fish. Thirty years' enjoyment is enough to establish the right under s. 1. [WILLES, J.—Proof of thirty years' enjoyment of land is evidence that the party is owner of the fee: but, would it prove that he is in possession of an inheritable estate?] The rule of law is well explained in *Bailey v. Stephens*, 12 C. B. N. S. 91 (E. C. L. R. vol. 104), where the right claimed was very analogous to that claimed here. In *Wickham v. Hawker*, 7 M. & W. 63, it was held that the grant to a person, *his heirs and assigns*, of "free liberty, with servants or otherwise, to come into and upon lands, and there to hawk, hunt, fish, and fowl," is a grant of a *license of profit*, and not of a mere *personal license of pleasure*; and therefore a profit à prendre within the Prescription Act, 2 & 3 W. 4, c. 71, s. 2. Parke, B., in giving judgment, says: "The liberty of *fowling* has been decided, in one case, to be a profit à prendre, and may be prescribed for as such:

(a) The point marked for argument on the part of the defendant was as follows:—

"That the right claimed in the fifth and sixth pleas is one which may be well claimed and pleaded under the statute 2 & 3 W. 4, c. 71."

Davies's Case, 3 Mod. 246. *The liberty to hawk is one species of ancupium (Manwood, c. 18, s. 10, p. 117), the taking of birds by hawks, and seems to follow the same rule. The liberty of fishing appears to be of the same nature; it implies that the person who takes the fish takes for his own benefit: it is common of fishing." [*702
 [BYLES, J.—That is no authority for the position that such a right enjoyed in gross is within the statute. [WILLES, J.—A right of several fishery may be appurtenant to a manor.] In Gray v. Bond, 2 Brod. & B. 667 (E. C. L. R. vol. 6), 5 J. B. Moore 527 (E. C. L. R. vol. 16), it was held, that, where the lessees of a fishery had publicly landed their nets on the shore at A. for more than twenty years, and had, at various times, dressed and improved the landing-place (both the fishery and the landing-place having originally belonged to one person, but no evidence being offered to show that he, or those who under him owned the shore at A., knew of the landing nets by the lessees of the fishery),—it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery by some former owner of the shore at A. Welcome v. Upton, 6 M. & W. 536, is a case of the same sort. [WILLES, J.—The same case in 5 M. & W. 398 is more to the purpose. There, a plea, that, before and at, &c., the defendant and all his ancestors, whose heir he is, from time whereof the memory of man is not to the contrary have had, and been used and accustomed to have, and of right ought to have had, and the defendant still of right ought to have, for himself and themselves, the sole and several herbage and pasturage of and in divers, to wit, 217 acres, &c., of a certain open field, &c.,—was held to be disproved by showing a grant to the defendant's ancestor eighty-one years before, for a valuable consideration: and it was further held that such a plea is not aided by the statute 2 & 3 W. 4, c. 71, s. 1. In delivering judgment, Parke, B., says: "The defendant ought *to have [*703 pleaded this right in a different mode. It has been urged in argument that this is not, strictly speaking, a claim of a profit à prendre, but an interest in the land itself: if that view is correct, the case would not fall within the 2 & 3 W. 4, c. 71. But, whether that be so or not, there is no question that the plea is not proved: it claims an immemorial right in Billingsley; but the evidence at the trial was of a conveyance in 1755 from Brereton to an ancestor of Billingsley. The only question upon which there seems to be any doubt is this: whether, supposing it to be a profit to be taken out of the land, the defendant can plead in the old form, claiming the right from time immemorial; because, the 1st section of the 2 & 3 W. 4, c. 71, prevents such right, when enjoyed for thirty years, from being defeated by showing that it first existed prior to that time. I think, however, that, under this section, the proper mode is, to plead the enjoyment of the right for the periods therein mentioned. It is true that the 5th section does not appear to be worded so as to embrace the present case; and Lord Tenterden, who framed the statute, seems to have drawn that section under the idea that a profit à prendre could not be claimed except as appendant or appurtenant. I think, however, that, by the general rules of law, the claim ought to be pleaded according to the fact. I am not sure that by putting a liberal construction on the 5th section, it might not be made to include the present case: but,

scription; but appurtenants may be created in some cases at this day. As, if a man at this day grant to a man and his heirs common in such a moore for his beasts levant or couchant upon his manor; or, if he grant to another common of estovers or turbary in fee-simple, to be burnt or spent within his manor: by these grants these commons are appurtenant to the manor, and shall passe by the grant thereof. Concerning things appendant and appurtenant, two things are implied,—first, that prescription (which regularly is the mother thereof) doth not make anything appendant or appurtenant, unless the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant: as, a thing corporeal cannot properly be appendant to a thing corporeall, nor a thing incorporeall to a thing incorporeall.” To this Mr. Hargrave adds a note,—“The true test seems to be the propriety of relation between the *principal* and the *adjunct*; which may be found out by considering whether *708] they so agree in nature and *quality as to be capable of union without any incongruity:” see 1 Ventr. 386; and see Gale, p. 9.

Upon the whole, it is submitted that the right here claimed is one of the very rights contemplated by the Prescription Act; and that the 5th section, properly construed, admits of its being pleaded as it is here.

Mellish, Q. C., in reply.—No case has decided that a right in gross like this can be proved by simple user. The mischief the statute was designed to obviate, was, that the user was liable to be defeated by showing unity of possession at any time since the time of Richard the First. *Wickham v. Hawker*, 7 M. & W. 63, has no application to the present case. And *Gray v. Bond*, 2 Brod. & B. 667 (E. C. L. R. vol. 6), 5 J. B. Moore 527 (E. C. L. R. vol. 16), was a case where the right was claimed as appurtenant to land, not of a right claimed in gross, as this is. So also in *Davies's Case*, 3 Mod. 246, the right was claimed as appurtenant. *Cur. adv. vult.*

MONTAGUE SMITH, J., now delivered the judgment of the court:—

To a declaration in trespass for breaking and entering the plaintiff's close and landing fishing-nets there, the defendant pleaded that the land was part of the shore of an inland lake called Coniston Water, and that the defendant (Le Fleming) and all his ancestors whose heir he is for sixty years before the suit enjoyed as of right and without interruption a free-fishery in the said water, with the right of landing their nets on the shore, as to the free-fishery appertaining, and then justified the trespasses under these alleged rights. There was a similar plea alleging the enjoyment for thirty years.

*709] To these pleas the plaintiff demurred; and the *demurrer raises the question whether the rights so pleaded to belong to the plaintiff in gross are within the Prescription Act, 2 & 3 W. 4, c. 71.

The construction of the statute on this point is not free from difficulty; and, although the question has arisen in the courts, it has not been decided. We are now called on to determine it; and, upon consideration of all the provisions of the act, we are led to the conclusion that rights claimed in gross are not within it.

The language of the 1st section may be sufficiently large to include some rights in gross. The subjects of claim are, “right of common or other profit or benefit to be taken and enjoyed from or upon any

land." The first and governing subject of claim referred to, is, "right of common." This general phrase, which defines no species of common, is no doubt wide enough to include a right of common in gross, as, common of pasture; but it is not an apt or proper phrase to designate a several right to the exclusive pasturage of land, or any other several and exclusive right to take any particular profit of the land. A sole and several right of pasturage in gross claimed by prescription was upheld by the Court of Exchequer in *Welcome v. Upton*, 6 M. & W. 536: see also Co. Litt. 122 a. So, a right to take all the wood in a certain close may lawfully exist as a profit à prendre in gross: *Sir Francis Barrington's Case*, 8 Co. Rep. 136. But such a right cannot be claimed as appurtenant to land, because it is in its nature wholly unconnected with the enjoyment of the supposed dominant tenement and its necessities: *Bailey v. Stephens*, 12 C. B. N. S. 91 (E. C. L. R. vol. 104). So, a right to a several fishery, and a right to take minerals, may lawfully exist as rights of profit à prendre in gross. These rights in gross, however, would not be aptly or properly described by the expression "right of common" in the Prescription Act; and the succeeding words may *reasonably be construed to relate to a profit or benefit of the same nature. If, [*710 then, there are some rights of profit à prendre in gross which do not fall within the fair meaning of the words of the act, it seems a reasonable ground for presuming that the legislature did not intend to deal with rights in gross at all, but contemplated only those more usual and ordinary rights of common and profits à prendre which are in some way appurtenant to lands, and are limited to the wants of a dominant tenement.

It may be observed that the instances in which rights in gross have come before the courts are very rare, and that the mischief referred to in the preamble of the Prescription Act arose in the litigation which was of constant occurrence between the owners of dominant and servient tenements. We think, however, the first section ought not to be read alone, but must be construed by reference to the other provisions of the act.

The 2d section relates to easements and to watercourses. We think this section refers to easements properly so called, and to rights which are in some way appurtenant to a dominant tenement. The Court of Exchequer, in the case of *Mounsey v. Ismay*, 34 Law J., Exch. 52, appears to have come to this conclusion. In the judgment of that court it is said, "We further think that the 2d section itself points to a right belonging to an individual in respect of his land." Again,— "What we think Lord Tenterden contemplated, were, incorporeal rights incident to and annexed to property, for its more beneficial and profitable enjoyment." The limited scope of the 2d section affords some ground for arriving at what was the intention of the legislature in the 1st section, especially as the introductory words are the same in both, viz. "No claim which may be lawfully made at the common law by custom, prescription, or grant."

*But the 5th section, which relates to pleading, seems to us [*711 to give a key to the true construction of the act. That section professes to enact forms of pleading applicable to all the rights within the act there*ofore claimed to have existed from time immemorial, and

which forms, it declares, shall in such cases be sufficient. These forms have clear relation to rights which are appurtenant to land, and to such rights only.

The second branch of the section enacts, "that, in *all* other pleadings to actions in trespass, and in *all* other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial,"—including, therefore, all rights claimable by prescription,—"*it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in the act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done.*"

The whole principle of this pleading assumes a dominant tenement, and an enjoyment of the right by the occupiers of it. The proof must of course follow and support the pleading. It is obvious that rights claimed in gross cannot be so pleaded or proved. If, therefore, they are held to be within the act, the enactment as to pleading cannot be satisfied: for then that mode of pleading which the statute enacts shall, in all cases of rights theretofore claimed from time immemorial, be sufficient, would not only be insufficient, but in certain cases manifestly inapplicable. Assuming the legislature to have had in view in this clause (as its language imports) all the rights formerly claimable by prescription, to which the act was intended to apply, it is necessary implication to hold that prescriptive rights in gross are not within the scope of the statute at all.

*712] *If the statute were in other respects free from doubt, possibly the effect of this clause might be got over: but we own that we think it indicates with tolerable clearness the subjects with which the legislature intended to deal.

It was suggested in the course of the argument that great difficulties would arise as to the evidence necessary to establish the nature and quality of rights in gross, if they were assumed to be within the statute, which do not occur in the case of rights proved and determined by user and enjoyment by the occupiers of a dominant tenement; as, for instance, whether sixty or thirty years' enjoyment by one man in the course of his own life, and no more, would establish any right, either in that man for life or a descendible right in gross, although there might be nothing in the nature of his single enjoyment to indicate perpetuity. If rights in gross were intended, it might reasonably be expected that some guide to solve difficulties of this kind, either by the mode of pleading or otherwise, would have been found in the act. In the view we take, it is not necessary to decide whether the words "free-fishery" in these pleas mean a sole several fishery or a common of fishery. Which ever they mean, the right is claimed in gross.

Having come to the conclusion that the provisions of the Prescription Act are not applicable to rights so claimed, it follows that the pleas are bad, and that our judgment on the demurrers must be given for the plaintiff.

Judgment for the plaintiff(a)

(a) Upon the trial, the jury affirmed the defendants' right to fish in Caniston Water, but negatived their claim to land nets on the plaintiff's land: and a verdict was found for the plaintiff, with 40s. damages.

***THOMPSON and Others v. HAKEWILL. July 10. [*713**

Covenant on a joint lease of certain land by two tenants in common, whereby they demised the land according to their several estates to the lessee, who covenanted with them and their respective heirs and assigns to repair. It then deduced a title to the plaintiffs as the assignees of one only of the undivided shares, traced the lease to the defendant's testator, and assigned a breach by him of the covenant to repair in the time of the plaintiffs:—

Held, on demurrer, that both the tenants in common of the reversion at the time of the breach ought to have joined as plaintiffs in the action.

COVENANT upon an indenture of demise.

The declaration stated that Pearson Thompson, Edward Armitage and Sarah Anne his wife, John Leathley Armitage and Elizabeth his wife, Eldred Green, Henry Green, Richard Allan Green, Mary Green, Elizabeth Ann Green, and Esther Green, by H. S. L., their attorney, sued Edward Charles Hakewill, executor of the last will and testament of Richard Monkhouse, deceased, by virtue of a writ, &c. For that Henry Thompson and Judith his wife, being tenants in common in fee, in right of the said Judith Thompson, of one undivided moiety of a messuage and land at Edmonton, in the county of Middlesex, and Sarah Thomasin Teshmaker being tenant in common of the other undivided moiety of the said messuage and land, the said Henry Thompson and Judith Thompson and the said Sarah Thomasin Teshmaker, by deed bearing date the 17th of January, 1793, let the said messuage and land, according to their several estates, to John Cobley, to hold to him, his executors, administrators, and assigns, for seventy-two years from the 24th of June then last past; and the said John Cobley by the said deed covenanted with the said Henry Thompson and Judith Thompson and Sarah Thomasin Teshmaker, and their respective heirs and assigns, that he and they would from time to time and at all times during the continuance of the said demise, at the proper costs and charges of him and them, well and sufficiently repair, uphold, support, sustain, maintain, amend, and keep the said messuage and all and singular other the buildings and fences which then were, or which thereafter during the continuance of the term thereby granted might be erected, [*714 built, or set up upon the said demised premises, or upon any part thereof, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, when, where, and as often as need or occasion should be or require, and the messuage, buildings, and fences, being so well and sufficiently repaired, upheld, supported, sustained, maintained, amended, and kept as aforesaid should and would, at the end and expiration or other sooner determination of the said lease, peaceably and quietly leave, surrender, and yield up unto the said Henry Thompson, Judith Thompson, and Sarah Thomasin Teshmaker, their heirs or assigns, together with all locks, keys, bars, bolts, doors, shutters, chimney-pieces, dressers, shelves, pipes, gutters, wells, pumps, sinks, and other fixtures which during the said lease should be affixed or set up in or about the said thereby demised premises, or any part thereof, in good plight and condition, reasonable wear and use thereof only excepted; and likewise that it should and might be lawful to and for the said Henry Thompson, Judith Thompson, and Sarah T. Teshmaker, their heirs and assigns, and every of them, with workmen and others, or without, twice or oftener in every year during the said term thereby granted, at reasonable

times in the day-time, to enter and come into and upon the said demised premises and every or any part thereof, there to view, search, and see the state and condition of the reparations thereof, and of all such defects, decays, and wants of reparation as upon any such view should be then and there found to give or leave notice or warning in writing at the said demised premises to and for the said John Cobley, his executors, administrators, or assigns, to repair and amend the same *715] *which said time and space of three months next after such notice and warning he the said John Cobley did thereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree to repair and amend the same accordingly: Averment, that afterwards, and during the continuance of the said term, divers other buildings and fences were erected, built, and set up upon the said demised premises by the said John Cobley; and afterwards and during the said term all the estate and interest of the said John Cobley in the said messuage vested in the said Richard Monkhouse by assignment: that, after the making of the said lease, the said Henry Thompson died, leaving the said Judith Thompson and Sarah T. Teshmaker him surviving; and afterwards, and during the said term, the said Sarah T. Teshmaker died, leaving the said Judith Thompson her surviving; and afterwards and during the said term, the said Judith Thompson died seised of and in her said reversion in the said demised premises; and by divers deeds and conveyances all the estate and interest of the said Judith Thompson in the said demised premises, and her said reversion of and in the same, which was in her at the time of her death, became vested and is now vested in the plaintiffs, who are now seised of the same: that afterwards, and during the said term, and whilst the said Richard Monkhouse was assignee as aforesaid, and whilst the said reversion was vested in the plaintiffs as aforesaid, entry was made upon the said demised premises by and on behalf of the plaintiffs, to see the state and condition of the reparations thereof, according to the said lease, and notice and warning in writing of divers decays, defects, and wants of reparation then found upon the said view in and about the said demised premises and the buildings then erected and built upon the same, was then given at *716] the said *demised premises to and for the said Richard Monkhouse, to repair and amend the same within the space of three months then next following, according to the said lease: that three months next after the said notice and warning elapsed in the lifetime of the said Richard Monkhouse before that suit, and all things had been done and had happened, and all periods of time had elapsed necessary to entitle the plaintiffs to sue the defendant on the said lease, and to bring that action, and before that suit, and whilst the said Richard Monkhouse was assignee as aforesaid, and whilst the reversion was vested in the plaintiffs as aforesaid, the said lease expired, ended, and determined: Breach, that the said Richard Monkhouse in his lifetime, after he became and whilst he was assignee as aforesaid, and after the said reversion came to and whilst it was vested in the plaintiffs as aforesaid, and during the continuance of the said demise, suffered the whole of the said messuage and all the other buildings and fences which were then erected, built, and set up upon the said demised premises, to be and remain greatly out of repair, for want of

needful and necessary reparations and amendments, contrary to the said covenant in the said lease: Further breach, that the said Richard Monkhouse in his lifetime, whilst he was assignee as aforesaid, and after the said notice and warning in writing, and whilst the said reversion was vested in the plaintiffs as aforesaid, did not within the said space of three months next following the said notice and warning, repair or amend the defects, decays, and wants of reparation mentioned therein, or any of them, but wholly neglected so to do, contrary to the said covenant in the said lease: Further breach, that, at the end, expiration, and determination of the said lease as aforesaid, the said Richard Monkhouse, in his lifetime, did not surrender or yield up the said messuage and demised premises with the buildings then erected upon the same, or any part thereof, well or sufficiently repaired or upheld or kept, according to the covenant in the said lease, nor did he surrender or yield up the same or any part thereof with the fixtures or any of them which during the said lease had been affixed or set up in or about the said demised premises, in good plight or condition, reasonable wear and use thereof excepted; but that the said Richard Monkhouse surrendered and yielded up the whole of the said messuage, buildings, premises, and fixtures greatly out of repair, and in a very ruinous and bad condition, reasonable wear and use excepted, contrary to the said covenant in the said lease: Claim, 2000*l*.

To this declaration the defendant demurred, the grounds of demurrer stated in the margin being, "that the declaration shows no title in the plaintiffs to sue, and that the joint covenants set forth in the declaration, under the circumstances therein set forth, do not run with the reversion." Joinder.

F. M. White (with whom was *Lush*), Q. C., in support of the demurrer.(a)—The declaration shows no title in the plaintiffs to sue. *Wootton v. Steffenoni*, 12 M. & W. 129, is in point. There, a declaration in covenant stated that A. and B. his wife were seised in fee of an undivided moiety of certain premises in right of the wife, and C. was seised of the other moiety; that A. and B. and C. demised the premises for twenty-one years to D., who covenanted with A. and C. to repair; that C. afterwards became seised in fee of the reversion of all the premises, and devised them to the plaintiffs and A. in fee; that A. died, and the plaintiffs survived him; and that before the death of A. all the estate of D. in the premises came to the defendant by assignment; and assigned as a breach that the defendant would not, after the assignment, and during the demise, and while the plaintiffs and A. were seised of the reversion, and before the death of A., repair the demised premises. The court inclined to think that the covenant sued upon, being made with A. and C. only, was not a covenant running with the land, on which the assignee of the reversion could sue,—at all events without an averment that the

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the declaration shows no title in the plaintiffs to sue:

"2. That the joint covenants set forth in the declaration, under the circumstances therein set forth, do not run with the reversion:

"3. That the declaration is bad, by reason of the non-joinder of the representatives of Sarah Thomasin Teshmaker, who is therein described as tenant in common of an undivided moiety of the messuage and land referred to in the said declaration."

breach was committed in the lifetime of A.'s wife. Parke, B., in the course of the argument, observes,—“This is a demise of two undivided interests, of which the parties are tenants in common, and it is a joint covenant with both: will that run with the reversion? It does not appear *on the face of the lease* that they have separate interests, otherwise the covenant might be construed to be a separate covenant with each in respect of his separate interest. Therefore this is a joint contract with two; and, though their estates are separate, we cannot look out of the lease for that fact.” Here, no title to sue is traced from the representatives of Sarah Teshmaker. [WILLES, J.—There are two questions,—first, whether the covenant may not enure as one covenant,—secondly, whether the parties may not sue upon their several covenants. There is no estoppel. The husband leases his wife's estate for seventy-two years; and she has survived him.] In *719] *Foley v. Addenbrooke*, 4 Q. B. 197 (E. C. L. R. vol. 45), a declaration in covenant at the suit of E. stated that F. and W. demised lands and iron-mines of one undivided moiety of which F. was seised in fee, to the defendant for a term of years, the defendant covenanting with F. and W. and their heirs, executors, &c., to erect and work furnaces, to repair the premises, and work the mines; and that F. died, and the plaintiff was F.'s heir: and breaches of covenant were assigned, committed since F.'s death. The defendant pleaded that W. survived F.: and it was held, on demurrer, that the action brought by L. without W. could not be maintained. [BYLES, J.—One of the parties in that case had no interest in the estate: the principle, therefore, is not applicable.] In delivering the judgment of the court in that case, Lord Denman says: “The result of the cases appears to be this, that, where the legal interest *and cause of action* of the covenantees are *several*, they should sue separately, though the covenant be joint in terms; but the several interest and the several ground of action must distinctly appear, as in the case of covenants to pay *separate rents* to tenants in common upon demises by them; or as in the instance cited from *Slingsby's Case* (5 Co. Rep. 18 b), in the note (1) to the case of *Eccleston v. Clipsham*, 1 Wms. Saund. 155, where a man by indenture demised Blackacre to A., Whiteacre to B., and Greenacre to C., and covenanted with them and each of them that he had good title,—each might maintain an action for his particular damage by a breach of that covenant. On the other hand, it appears from several cases, that, *if the cause of action be joint*, the action should be joint, though the *interest be several*: *Coryton v. Lythebye*, 2 Saund. 115; *Martin v. Crompe*, 1 Ld. Raym. 340; *Wilkinson v. Hall*, 1 N. C. 713, 1 Scott 675. In the present case, the covenants for breach of which the action is brought are such as to give the covenantees a joint *720] *interest in the performance of them*: and the terms of the indenture are such that it seems clear that the covenantees might have maintained a joint action for breach of any of them. Upon this point the case of *Kitchen v. Buckly*, 1 Lev. 109, is a clear authority: and the case of *Petrie v. Bury*, 3 B. & C. 353 (E. C. L. R. vol. 10), 5 D. & R. 152 (E. C. L. R. vol. 16), shows, that, if the covenantees could sue jointly, they are bound to do so.” [WILLES, J.—You have to make out that this covenant is not severable; and, next, that, assuming it to be a joint covenant, it does not go with the reversion.] The

language of the covenant, as set out on the record, is joint. If tenants in common may join in an action of this kind, they must join: and it is plain from *Kitchin v. Buckley*, Sir T. Raym. 80, that they *may* join. Whether the covenant be joint or several, is always a question of intention. *Bradburne v. Botfield*, 14 M. & W. 559. A joint covenant with tenants in common does not run with the land: *Roach v. Wadham*, 6 East 289.

Maude, contra. (a)—The argument on the part of the tenant assumes this to be a joint interest. That, however, is a fallacy. In Co. Litt. 45 a, it is laid down, *that, "if two severall tenants of severall lands joyne in a lease for yeares by deed indented, these be severall leases, and severall confirmations of each of them from whom no interest passeth, and worke not by way of conclusion in any sort, because severall interests passe from them. B., tenant for life of C., and he in the remainder or reversion in fee, having severall estates in the one and the same land, joyne in a lease for yeares by deed indented, this demise shall worke in this sort; during the life of C. it is the lease of B. and confirmation of him in the reversion or remainder, and after the decease of C. it is the lease of him in the reversion or remainder, and the confirmation of B.; for, seeing the lessors have severall estates, the law shall construe the lease to move out of both their estates respectively, and every one to let that which he lawfully may let, and not to be the lease onely of tenant for life, and the confirmation of him in the remainder or reversion; neither is there any conclusion in this case, as shall be said hereafter. Tenant for life and he in the remainder in fee made a lease for years by deed indented; the lessee was ejected, and brought an *ejectione firmæ*, and declared upon a demise made by tenant for life and him in remainder, and, upon not guilty pleaded, this speciall matter was found, and that tenant for life was living, and it was adjudged against the plaintiff, for, during the life of the tenant (as hath been said), it is the lease of the tenant for life, and therefore during his life he ought to have declared of a lease made by him, and after his decease he ought to declare of a lease made by him in remainder. And the deed indented could be no estoppel in this case, because there passed an interest in them both. And whensoever any interest passeth from the party, there can be no estoppel against him: and so it was adjudged. And accordingly it was adjudged, that, *where tenant in taile and he in the remainder in fee joined in a grant of a rent-charge by deed in fee, and after tenant in taile died without issue, the grantee distrained and avowed by force of a graunt from him in the remainder, and, upon non concessit, the jury found the special matter; and it was adjudged for the avowant; for, every one granted according to

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the declaration shows that the plaintiffs are entitled to sue the defendant on the covenants to repair contained in the lease in question; the reversion in that lease having been at the time of the breach, as is admitted, in the plaintiffs:

"2. That the reversion of the whole or of a moiety of the demised premises having been at the expiration of the lease vested in the plaintiffs; and, the whole of the demised premises having been then out of repair, as is admitted, the plaintiffs are entitled to recover damages for the non-repair of the whole or of a moiety of the premises:

"3. That the plaintiffs, being the representatives of the surviving covenantees, are entitled to sue on the covenants."

his estate and interest." The same rule is laid down in *Rel. Abr. Grants* (G), pl. 2, 8. [BYLES, J.—Does it appear by the lease here that the lessors were tenants in common?] The declaration states that Henry Thompson and his wife were tenants in common in fee, in right of the wife, of one undivided moiety, and that Sarah T. Teshmaker was tenant in common of the other undivided moiety. Where there is nothing to compel the court to assume that the covenant is joint, they will not do so. The rule as laid down in *Co. Litt. 45 a*, is also laid down in the same terms in *Sheppard's Touchstone*, by Preston, p. 85, and in *Bac. Abr. Joint-Tenants* (K). In *Eccleston v. Cliphsham*, 1 Wms. Saund. 153, it was held, that, though a covenant be *joint and several* in the terms of it, yet, if the interest and cause of action be *joint*, the action must be brought by all the covenantees: and, on the other hand, if the interest and cause of action be *several*, the action may be brought by one only. And see the authorities referred to in the note. See also the judgment of Williams, J., in *Beer v. Beer*, 12 C. B. 60, 80, to the same effect. In *Sorabie v. Park*, 12 M. & W. 146, 158, Parke, B., says: "I think the correct rule is laid down by Gibbs, C. J., in the case of *James v. Emery*, 5 Price 583, with the qualification stated by Mr. Preston in the note in *Sheppard's Touchstone* 166. That rule is, that a covenant will be construed to be joint or several according to the interest of the parties *723] appearing upon the face of the deed, if the words are *capable of that construction; not that it will be construed to be several by reason of several interests, if it be expressly joint. Suppose there were a covenant with A. and B. *jointly* that a certain thing should be done by the covenantor; both of those persons must sue. But, where it appears upon the face of the deed that A. and B. have several interests, they must sue separately; for, though the words be *prima facie* joint, they will be construed to be several, if the interest of either party appearing upon the face of the deed shall require that construction." [WILLES, J.—The difficulty here, to my mind, is one of pleading. The lease is not set out in terms: it would have been much more satisfactory if it had been. It may be that the court may feel bound to assume that the covenant is joint, and so the point which you are now arguing (and upon which, as at present advised, the court is inclined to agree with you), may not arise. As the declaration now stands, I do not think it raises the point.] The lease is in court, and is in the words in the declaration. [WILLES, J., after looking at the lease, observed that it appeared to be a copyhold title, and that, assuming it to be set out in the declaration in terms (which White assented to), the question would be raised simpliciter. BYLES, J.—The lease shows that the lessors demised according to their several estates.] In *Servante v. James*, 10 B. & C. 410 (E. C. L. R. vol. 21), 5 M. & R. 299, the covenant was with the several part-owners of the vessel and *their several and respective* executors, &c. Bayley, J., there says: "The covenants in question are made with the several part-owners of the vessel and *their several and respective* executors, administrators, and assigns; which latter words would be quite inoperative if the right to sue were in all the parties jointly. In case of the death of one part-owner, by the words of the covenant his personal

representative *might sue. If the covenant were joint, the executor of the survivor only could maintain an action; but [*724 such a construction would be quite at variance with the words *their several and respective executors, &c.* Again, if the covenant were joint, a release by any one would defeat an action brought by all, an inconvenience that the several parties might wish to avoid. For these reasons, I think that the language of the covenant is several, and that the interests of the parties are several, and consequently that the action brought by all jointly cannot be maintained. The cases cited in the notes to *Eccleston v. Clipsbam*, 1 Wms. Saund. 153, show that the words will be distributed so as to give effect, if possible, to the intention of the parties to the covenant. This covenant, it is submitted, may be read as a covenant with the lessors severally and their several and respective heirs and assigns; and, if so, the plaintiffs were at liberty to sue in respect of their several interests. *Badeley v. Vigurs*, 4 Ellis & B. 71 (E. C. L. R. vol. 82), is an authority to the same effect. In *Yates (or Gates) v. Cole*, 2 Brod. & B. 660 (E. C. L. R. vol. 6), 5 J. B. Moore 554 (E. C. L. R. vol. 16), it was held that tenants in common might sue in covenant, for neglect of repairs, the lessee of a house, who, subsequently to the demise but before the breach alleged, became a co-tenant of the plaintiffs in the same house.

White, in reply.—The question is one of construction,—whether the covenants in this indenture are joint or several; for, it is clear from the language of the court in *Foley v. Addenbrooke*, 4 Q. B. 197 (E. C. L. R. vol. 45), that, where tenants in common may join, they must join. Wherever covenants can be construed to be joint, convenience requires that they should be so construed. In *Badeley v. Vigurs* the whole reversion had, by merger and otherwise, come to the persons who sued. No case is to be found where tenants in *common have severed in suing upon a covenant to repair. [*725 The difficulties which would result from such a course are patent: different juries might give different damages for the same breach. The rule as laid down in s. 815 of Littleton was acted upon in *Kitchin v. Buckley*, T. Raym. 80, and in *Beer v. Beer*, 12 C. B. 60, 81 (E. C. L. R. vol. 74). [WILLES, J.—The course which the argument has taken seems to have reversed your position. If a joint covenant with tenants in common will run with the land, the defendant is probably entitled to judgment on this demurrer; otherwise not. The judgment in *Foley v. Addenbrooke* raises a difficulty. We will, therefore, take time to consider.] *Cur. adv. vult.*

BYLES, J., now delivered the judgment of the court: (a)—

The declaration in this case was in covenant on a joint lease of certain land by two tenants in common, whereby they demised the land according to their several estates to the lessee, who covenanted with them and their respective heirs and assigns to repair. It then deduced a title to the plaintiffs as the assignees of one only of the undivided shares, traced the lease to the defendant's testator, and assigned a breach by him of the covenant to repair in the time of the plaintiffs.

To this declaration there was a demurrer; and the objection taken,

(a) The case was argued before Willes, J., and Byles, J., at the sittings in banco after Trinity Term.

was, that both the tenants in common of the reversion at the time of the breach ought to have joined as plaintiffs in the action.

The form of the covenant which we have to construe renders us little assistance. It was suggested that the words "heirs and assigns," *726] being in the plural, assisted *the plaintiffs. But the word "heirs" is commonly used in the plural, and is satisfied either by heirs in succession, or by heirs in co-parcenary. The word "assigns" imports no more than that a benefit from the covenant was intended to the assignees of the undivided estates in the reversion; but, whether severally or jointly, it does not help us to discover. The word "respective" is equally appropriate, whether the respective heirs and assigns of the covenantees are to join or sever in an action. On the other hand, it may be observed that the covenant is with "the lessors," and not with "the lessors and each of them."

There is no doubt that a demise by tenants in common, though joint in its terms, operates as a separate demise by each tenant in common of his undivided share, and a confirmation by each of his companions: *Eccleston v. Clipsham*, 1 Wms. Saund. 153; 2 Rol. Abr. 64; *Sheppard's Touchstone*, by Preston, 85; *Heatherley v. Weston*, 2 Wils. 232. And there is also no doubt that the covenants in a lease by several lessors may be construed as joint or several in respect of the covenantees, according to their interest in the land apparent on the face of the deed: *Sorsbie v. Park*, 12 M. & W. 146.

The form of the covenant helping us little, we are at liberty to endeavour to gather the intentions of the parties by considering the consequences of construing this covenant as joint or several in respect of the covenantees.

The interest of the covenantees, tenants in common, in a covenant of this nature may be of four kinds. First, the covenantees may be simply joint-tenants of the covenant. This construction of the covenant is attended with the inconvenience, that the right to sue vesting in the survivor and his representative, real or personal, may be severed *727] from the estate or some of *the estates, though the plaintiff, at law, would no doubt sue as trustee for the owners of the reversion at the time of the breach. Secondly, the covenant may be split, and treated as several covenants, and running respectively with each undivided share in the reversion of each tenant in common. The inconvenience of this construction is, that a plurality of actions will always be necessary, which plurality might cause great hardship both to the landlords and to the tenant. There is this further inconvenience, that the damages which a jury might give in an action by one of several tenants in common would not be binding on a jury in another action at the suit of another tenant in common, who therefore in respect of another interest in the reversion exactly the same in degree, might for the same breach recover damages much more or much less. Lastly, there is this inconsistency, that, if one of the original shares should be split up into two tenancies in common, those two tenants in common at all events *may* join in suing: *Kitchen v. Buckly*, 1 Lev. 109. Thirdly, the covenant may be treated as one entire covenant running not with undivided shares of the reversion, but with the whole reversion. The only inconvenience of this construction is, that no action will lie unless the owners of the entire

reversion at the time of the breach can be induced to join as plaintiffs. It is clear that a covenant to repair may run with the entire reversion of tenants in common: *Kitchen v. Buckley*. But it may be observed, that, in that case, the covenants could not have been several, as the demise was before the severance of the reversion. Fourthly, such a covenant may be construed as a covenant in suing on which the tenants in common may join or sever at their election. And the language of the report in *Kitchen v. Buckley*, is in favour of such a *construction where the severance of the reversion is after the demise. [*728]

We, however, are now called on to decide that the benefit of such a covenant contained in a joint demise originally made by tenants in common, not only *may*, but *must* run with the entire reversion; in other words, that tenants in common so situated, not only *may*, but *must* join as plaintiffs in an action of covenant.

The balance of convenience, we think, inclines in favour of this construction, and is also sustained by the authority of the case of *Foley v. Addenbrooke*, 4 Q. B. 197 (E. C. L. R. vol. 45), where the Court of Queen's Bench held that tenants in common of the reversion *must* join in an action on such a covenant as this contained in a lease made by themselves jointly. It is true that one of the covenantees there did not on the face of the declaration appear to have had an interest in the reversion: but the court said that they must assume that she had, and on that assumption pronounced judgment. The judgment, therefore, of the Queen's Bench, being on the very point before us, must govern our decision.

This view is also in accordance with Littleton, § 314, that, even in the case of rent, where the thing to be rendered is indivisible, and due to all, tenants in common must join. The section of Littleton is as follows:—"Also, if there be two tenants in common of certaine land in fee, and they give this land to a man in taile, or let it to one for terme of life, rendring to them yearly a certaine rent, and a pound of pepper, and a hawke or a horse, and they be seised of this service, and afterwards the whole rent is behind, and they distraine for this, and the tenant maketh rescouse: In this case, as to the rent and pound of pepper they shall have two assises, and as to the hawke or the horse but one assise. And the reason why they shall *have two assises as to the rent and pound of pepper is this, [*729] insomuch as they were tenants in common in severall titles, and when they made a gift in taile or lease for life, saving to them the reversion, and rendering to them a certaine rent, &c., such reservation is incident to their reversion; and for that their reversion is in common, and by severall titles, as their possession was before the rent and other things which may be severed, and were reserved unto them upon the gift, or upon the lease, which are incidents by the law to their reversion, such things so reserved were of the nature of the reversion. And in so much as the reversion is to them in common by severall titles, it behoveth that the rent and the pound of pepper, which may be severed, be to them in common, and by severall titles. And of this they shall have two assises, and each of them in his assise shall make his plaint of the moietie of the rent, and of the moietie of the pound of pepper. But of the hawke or of the horse,

which cannot be severed, they shall have but one assise, for a man cannot make a plaint in an assise of the moietie of a hawke, nor of the moietie of a horse, &c. In the same manner it is of other rents and of other services which tenants in common have in grosse by divers titles, &c."

The analogy of this to the case of a covenant with two tenants in common to repair a house, in every brick whereof they are jointly interested, and more especially to such a covenant to repair after notice, is too striking to require further illustration.

We accordingly give our judgment for the defendant.

Judgment for the defendant.(a)

(a) The declaration was afterwards amended as follows, the name of Harry William Busk being added as a plaintiff,—
 *730] "For that Henry Thompson and Judith his wife, *at the time of the making of the demise hereinafter mentioned, were seised in fee as tenants in common in right of the said Judith Thompson, and at the will of the lords of the manor of Edmonton, Bowesford, Paul's House, and Darnford, in the county of Middlesex, according to the custom of the said manor, of one undivided moiety of and in a messuage and land at Edmonton, in the said county, and Sarah Thomasin Teshmaker was at the time of the making of the said demise seised in fee as tenant in common, at the will of the said lords, according to the custom of the said manor, of the other undivided moiety of and in the said messuage and land, the said messuage and land being a customary tenement of the said manor demisable by copy of court roll by the lords of the said manor, at their will, to persons willing to take the same in fee simple, to hold at the will of the said lords, according to the custom of the said manor; and thereupon the said Henry Thompson and Judith Thompson and Sarah T. Teshmaker, being so seised, demised the said messuage and land to John Cobley by a deed duly executed by them, and also duly executed by the said John Cobley, bearing date the 17th day of January, 1793, and which deed was in the words and figures following, that is to say [here the deed was set out]: Averment, that, after the making of the said lease, and during the continuance of the said term, divers other buildings and fences were erected, built, and set up upon the said demised premises by the said John Cobley; and afterwards, and during the said term, all the estate and interest of the said John Cobley in the said messuage vested in the said Richard Monkhouse by assignment: that, after the making of the said lease, the said Henry Thompson died, leaving the said Judith Thompson and Sarah T. Teshmaker him surviving; and afterwards, and during the said term, the said Judith Thompson died; and by divers deeds, covenants, admissions, and conveyances in the law, all the estate and interest of the said Henry Thompson and Judith Thompson and of the said Sarah T. Teshmaker of and in the said demised premises, and the whole of the reversion in the said lease, became during the said term vested in the plaintiffs, who became and were seised of the same in fee, and at the will of the lords of the said manor, according to the custom thereof: that all things had been done and had happened, and all periods of time
 *731] had elapsed *necessary to entitle the plaintiffs to sue the defendants on the covenants in the said lease, and to bring this action, and before this suit and whilst the said Richard Monkhouse was assignee as aforesaid, and whilst the said reversion was vested in the plaintiffs as aforesaid, the said lease expired, ended, and determined: Breach, that the said Richard Monkhouse in his lifetime, after he became, and whilst he was assignee as aforesaid, and after the said reversion came to and whilst it was vested in the plaintiffs as aforesaid, and during the continuance of the said demise, suffered the said messuage and the buildings and fences which were then erected and set up upon the said demised premises to be and remain greatly out of repair for want of needful and necessary reparations and amendments, contrary to the said covenants in the said lease: And that at the end, expiration, and determination of the said lease as aforesaid, the said Richard Monkhouse in his lifetime did not surrender or yield up the said messuage and demised premises with the buildings then erected upon the same, or any part thereof, well or sufficiently repaired or upheld or kept according to the covenant in the said lease, nor did he surrender or yield up the same, or any part thereof, with the fixtures, or any of them, which during the said lease had been affixed or set up in or about the said demised premises, in good plight or condition, reasonable wear and use thereof excepted; but the said Richard Monkhouse surrendered and yielded up the said messuage, buildings, premises, and fixtures greatly out of repair, and in a very ruinous and bad condition, reasonable wear and use excepted, contrary to the said covenant in the said lease: Claim, 2000*l*."

*GAVED v. MARTYN. June 3.

[*732]

1. One who by lease or by license from the owner of the soil has the right of digging and working clay (or minerals) thereunder, has such an interest in the soil as will entitle him to claim under the Prescription Act, 2 & 3 W. 4, c. 71, a right to the flow of water over the surface, by a twenty years' user.

2. A right to the flow of water along an artificial cut over the soil of another cannot be acquired under the Prescription Act, 2 & 3 W. 4, c. 71, unless the circumstances under which the cut was made show that it was intended to be of a permanent character.

3. H. occupied clay-works, and, for the more convenient use of them, in 1830, under an agreement with one G. (with the consent of G.'s landlord), made a leat or artificial cut for the purpose of conducting water from a brook flowing over the land in G.'s occupation, to his works. The plaintiff in 1835 succeeded H. in the occupation of the clay-works, and continued for upwards of twenty years, without interruption, the enjoyment of the leat:—Held, that, notwithstanding the plaintiff had no notice of the agreement between H. and G., there was evidence from which the jury might find that the plaintiff had not enjoyed the stream for twenty years *as of right*.

4. The rights of tin-bonders according to the customary law of Cornwall to the use of water within their tin-bounds, for the purpose of streaming their tin, will not prevent the acquisition by another of a prescriptive right under the 2 & 3 W. 4, c. 71, to the enjoyment of the water by a twenty years' user: nor will this right be affected by an agreement with the tin-bonders for a money payment to abstain from fouling the water by streaming their tin therein.

THIS was an action for obstructing the plaintiff in the enjoyment of his alleged right to certain watercourses.

The first count of the declaration stated, that, before and at the time of the grievances thereafter mentioned, the plaintiff was and is possessed and is the occupier of certain land and premises called Carrancarrow, in the parish of St. Austell, in the county of Cornwall, and was and is entitled to have the water of a certain stream or watercourse flow by the aid or means of a launder or water-carrier of the plaintiff, part of which launder or water-carrier was and of right ought to be and remain, and which the plaintiff was entitled to have and to have remain, upon certain premises of the defendant towards, to, through, over, and along the said land and premises of the plaintiff, without being diverted or obstructed by the defendant as thereafter mentioned: Yet the defendant, on divers occasions, took, removed, and carried away the said launder or water-carrier, and diverted and obstructed the water of the said stream or watercourse from, and prevented it from flowing through, to, over, and along *the said land and premises of the plaintiff; whereby [*733 the plaintiff was deprived of the use of the said water, and was prevented from using the same in divers lawful ways, and for the purpose of working certain clay-works of the plaintiff in and upon his said land in the way of his business as a clay-worker, and was greatly damaged in the way of his said business, and in the enjoyment of his said land, and the said launder or water-carrier of the plaintiff was also greatly injured.

The second count stated that the plaintiff was and is possessed and is the occupier of certain land and premises as in the first count particularly described, and was and is entitled to have the water of a certain stream or watercourse flow by the aid and means of another launder or water-carrier of the plaintiff towards, to, through, over, and along the said land and premises of the plaintiff, without being diverted or obstructed by the defendant as thereafter mentioned: Yet the defendant, on divers occasions, took, removed, and carried

away the said launder or water-carrier, and diverted and obstructed the water of the said stream or watercourse from, and prevented it from flowing through, to, over, and along the said land and premises of the plaintiff; whereby the plaintiff was deprived of the use of the said water, and was prevented from using the same in divers lawful ways, and for the purpose of working certain clay-works of the plaintiff in and upon his said land, in the way of his business as a clay-worker, and was greatly damaged in the way of his said business, and in the enjoyment of his said land; and the said launder or water-carrier of the plaintiff was also greatly injured.

The third count stated that the plaintiff was and is possessed and is the occupier of certain land and premises as in the first count particularly described, and *near to a certain brook called, to wit, *734] Coxbarrow Brook, and that long before and until and at the time of the committing of the grievances thereafter mentioned a great part of the water of the said brook did of right run and flow, and of right ought to have run and flowed, and still of right ought to run and flow therefrom into and along a certain leat or channel, and thence unto, into, by, along, through, and over the said land and premises of the plaintiff: Yet the defendant, well knowing the premises, diverted and prevented the water of the said brook, which of right ought to have run and flowed, and might and otherwise would have run and flowed, into and along the said leat, unto, by, along, into, through, and over the said land and premises of the plaintiff; whereby the plaintiff was deprived of the use of the said water, and was prevented from using the same in divers lawful ways and for the purpose of working certain clay-works of the plaintiff in and upon the said land, in the way of his said business as a clay-worker, and was greatly damaged in the way of his said business, and in the enjoyment of his said land.(a)

There were other two counts, for trespasses on Carrancarrow, which became immaterial.

The defendant pleaded,—first, to the first, second, and third counts, not guilty,—secondly, to the first count, that the plaintiff was not nor is he entitled to have the water of the said stream or watercourse flow by the aid and means of the said launder or water-carrier part of *735] which the plaintiff was entitled to have *and to have remain upon the said premises of the defendant, towards, to, through, over, and along the said land and premises of the plaintiff, as in the said first count alleged,—thirdly, to the second count, that the plaintiff was not nor is he entitled to have the water of the said stream or watercourse flow by the aid and means of the said launder or water-carrier of the plaintiff in the said second count mentioned, towards, through, over, and along the said land and premises of the plaintiff, as in the said second count alleged,—fourthly, to the third count, that a great part of the water of the said brook did not of right run and flow, nor ought of right to run and flow therefrom into and along the said leat or channel unto, into, by, along, through, and over the said

(a) The following particular was delivered pursuant to a judge's order,—

“The third count of the declaration in this action relates to a leat called the foul-water leat flowing out of the Coxbarrow Brook, at a point between the two launders mentioned in the first and second counts.”

land and premises of the plaintiff, as in the said third count alleged,—fifthly, to the fourth and fifth counts, payment of 5*l.* into court.

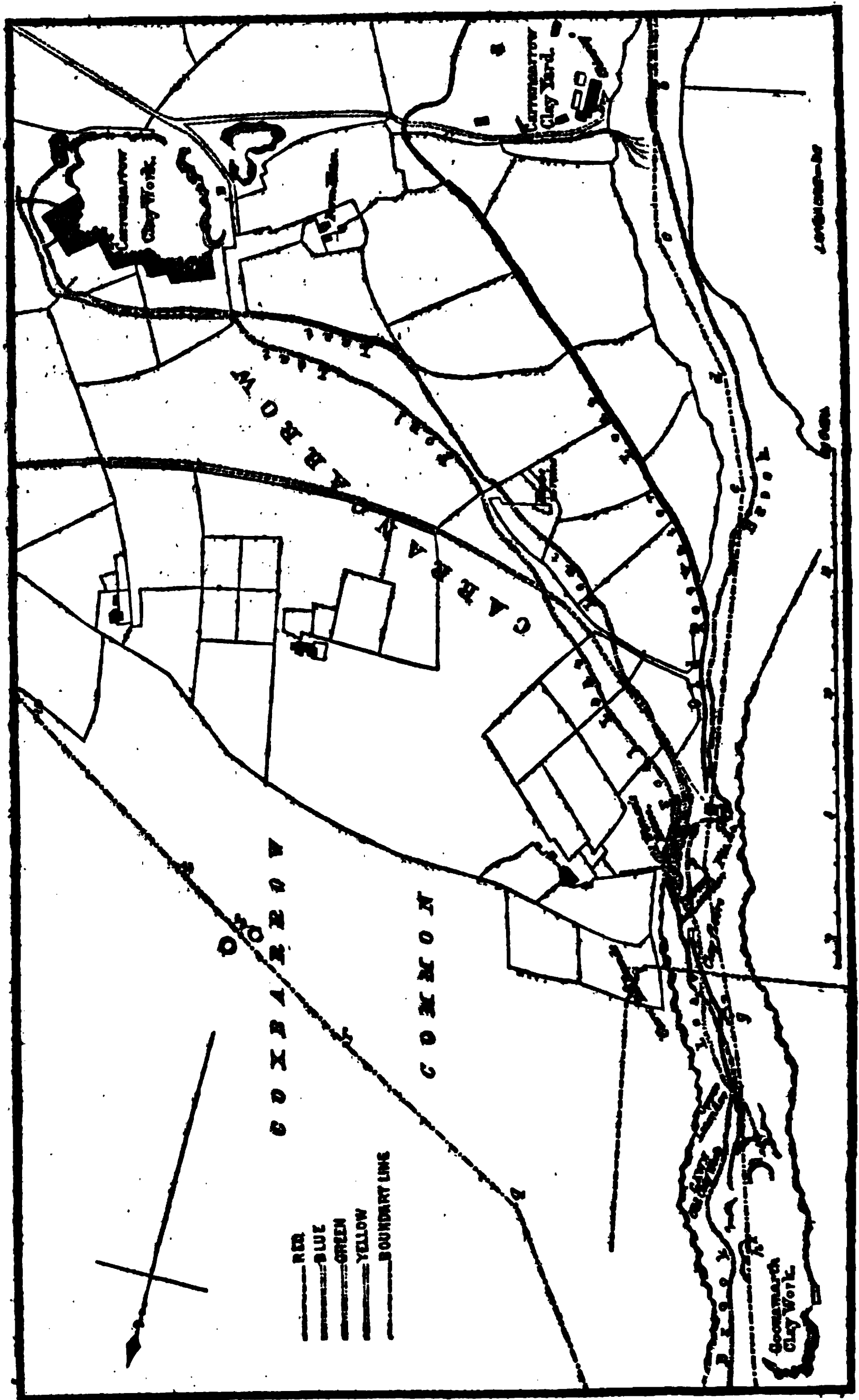
The plaintiff took issue on the first four pleas, and replied to the last damages *ultra*.

The cause was tried before Channell, B., at the Summer Assizes for Cornwall in 1864. The facts which appeared in evidence were as follows:—The plaintiff, John Gaved, was tenant and occupier under Lord Mount-Edgumbe of certain clay-works in the parish of St. Austell, in the county of Cornwall, called the Carrancarrow clay-works, which he had occupied since the year 1835. In 1855, the defendant became, by purchase, the owner of the adjoining land of Goonamarth, in the parish of St. Mewan, in which also there was a sett for working china-clay, of which one Higman was the grantee. Mr. Trevanion was the former owner of Goonamarth, and the sett to Higman was granted by his trustees. In addition to the clay-setts above mentioned, there was an ancient tin-stream work, called Cawn stream work, held and worked under ancient customary tin-bounds, extending over *parts of each of the above-named estates of Carrancarrow and Goonamarth. One Edward Hooper was [*736 until about twelve years ago in possession of the working of this tin-stream work, and also tenant of the farm of Carrancarrow under the Earl of Mount Edgumbe, which farm extended as far as the plaintiff's clay-works.

Two leats or streams, one coloured *brown* on the plan, and called the "foul-water leat," the other of clear water, coloured *green* on the plan, supplied water to the plaintiff's works, and both were essential for their carrying on. There was also a stream called "the brook," coloured *blue* on the plan, from which the foul leat derived all its supply. The clear-water leat derived its supply from several sources,—partly from "the old woman's house," and from an adit near thereto driven by the plaintiff in 1836, and partly from an artificial cut from the tin-tye near the old Cawn Clay-works made in 1832. From this tye the water had always flowed down to the Carrancarrow Clay-works since 1837. The plaintiff continued to use this water till the defendant came, in 1855. The upper launder was put up in 1842, to prevent the clear water from mixing with the foul water of the brook. The water then flowed direct from the tye down the leat to the Carrancarrow works. About the year 1852, an alteration was made in the leat, the uncoloured part of it being abandoned, and the coloured part adopted. The part abandoned was used by one Wheeler, who had other clay-works in the neighbourhood, and who obtained his supply of water from a point higher up than the plaintiff's, taking it over the brook at the same point, but at a higher level than the plaintiff's. The water continued to flow to the plaintiff's works through this leat until 1863, when the acts complained of, viz. the removal of the launders *and the diversion of the stream by the defendant, [*737 took place.

When the defendant became possessed of his estate, in 1855, he claimed from the plaintiff 20*l.* a year for the use of the water: but the plaintiff refused to pay it.

The tin-bounds were worked by Edward Hooper in 1852, Hooper being at that time also the tenant of Carrancarrow farm. They were



customary tin-bounds. In that year Hooper told the plaintiff, that, unless he paid him for stopping the streaming, he would foul the water, and stop the clay-works. The plaintiff agreed to give him 12. per quarter not to stream, and paid that sum for three quarters, when he refused to pay any more. The plaintiff had a license to dig clay under Hooper's farm. The lower launder was put in by Edward Hooper shortly after the Carrancarrow Clay-works were begun, in 1830. It also appeared that the course of the clear-water leat had been twice varied,—once in consequence of the banks of the brook being washed away in a storm, and once for the convenience of an adjoining occupier.

The accompanying plan shows the position of the several streams, and of the plaintiff's and defendant's works respectively. Its description by the surveyor who made it, so far as is material, was as follows:—The straight green line represents an old tin-tye (an open adit): it extends into the brook. The dotted green line represents an underground conduit, continuing the leat, which afterwards becomes open, and flows down to the Carrancarrow works. Water flows into this leat from "the old woman's house." The brown line shows an open leat running down to Carrancarrow works. The upper launder crosses the brook, and was placed for the purpose of carrying the water over the brook in a pure state, the brook being fouled by works. [*738 *The channel of the leat throughout is artificial. The dotted red line marks the tin-bounds, extending into both estates, viz. Lord Mount-Edgecumbe's and Mr. Trevanian's.

On the part of the defendant, it was submitted that there was no evidence of the plaintiff's right to either of the watercourses claimed, both being artificial, and their origin shown; that his claim had been contested since 1855; that he was not such an occupier as could gain a right by user under the Prescription Act, 2 & 3 W. 4, c. 71; and that the alterations in the course of the clear-water leat and the payments to Hooper for the use of the water from the tin-tye, were fatal to the right.

Witnesses were called on the part of the defendant to prove that before the leat was cut to Hooper's works (the Carrancarrow works), it was agreed between him and the then occupier of Goonamarth (Geach) that he might make it, subject to the payment of a pepper-corn or a furze-prickle by way of acknowledgment, and subject to the right of the occupiers of Goonamarth to divert the water for their own use when necessary.

The following are the questions which were put by the learned Baron to the jury, with their answers thereto:—

"First,—Was the foul-water leat cut from the brook with the consent of Geach, and under the terms and conditions spoken to by the two Geaches; or was it done by Hooper, of right, without any agreement?

"Answer. It was with the consent of Geach.

"Secondly,—Was there a cutting off of the water from the leat on one or more occasions when water in the brook was scarce; and, if so, was that done in virtue of the condition to that effect originally imposed, or done in assertion of the general right to have the water flow down the brook?

*739] *Answer.* There was, for both reasons.

"Thirdly,—Is the water in the part of the leat above the lower launder derived altogether from the sources of supply above the upper launder, or is it partially so derived and partially derived from springs and sources of supply between the upper and lower launders?

Answer. Partially from both sources.

"Fourthly,—Have the plaintiff and those through whom he claims had the uninterrupted enjoyment of the two leats, or of either of them, as of right, for more than twenty years, without interruption?

Answer. They have had uninterrupted possession of the leat colour green, from the upper launder downwards; but have not had uninterrupted possession of the foul leat too.

"Fifthly,—Was the payment of 4*l.* a year to Hooper a payment made for the right to have the water? or was it a payment only in consideration of Hooper not fouling by using it for streaming of tin?

Answer. Only for the purpose of preventing Hooper from fouling it."

The learned Baron thereupon directed a verdict to be entered for the plaintiff on the first and second counts, and for the defendant on the third count,—reserving leave to either side to move.

Montague Smith, Q. C., for the plaintiff, in Michaelmas Term last, obtained a rule calling upon the defendant to show cause why the verdict found for him on the third count should not be set aside, and a verdict entered thereon for the plaintiff, on the ground that the agreement proved by the witnesses Geach, and the cutting off the water found by the jury, did not destroy or affect the enjoyment of the plaintiff since 1836; or why there should not be a new trial on
*740] the *ground of misdirection on the part of the learned judge, in erroneously directing the jury on the effect of the agreement, and in directing them that the agreement, if believed by them, would render the plaintiff's enjoyment an enjoyment not of right; and also on the ground that the verdict was against the evidence.

Karslake, Q. C., on the same day, on behalf of the defendant, obtained a rule calling upon the plaintiff to show cause why the verdict found for him on the first and second counts should not be set aside, and a verdict entered for the defendant, on the grounds,—first, that the plaintiff was a mere licensee, and had no possession of the water to enable him to maintain this action,—secondly, that the user of the water by the plaintiff was contentious since the year 1855, and that no proof was given by him of any enjoyment of the water for twenty years as of right,—thirdly, that, the watercourses in question being altogether artificial, no right to continue to receive their flow could be acquired by the plaintiff,—fourthly, that the plaintiff, not being under the circumstances able to acquire a right to the water in the tin-tye as against the tin-bounder, was incapable of acquiring the right at all: or for a new trial, on the ground that the verdict was against the evidence.

Karslake, Q. C., and *Pinder*, showed cause against the plaintiff's rule.—There was no such enjoyment of the leat by the plaintiff and those under whom he claims as to give him a right to an easement under the 2d section of the 2 & 3 W. 4, c. 71. That section enacts

that "no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, *or to any watercourse, or the use of any water, to be enjoyed [*741 or derived upon, over, or from any land or water of our said lord the king, &c., when such way or other matter as lastly hereinbefore mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and, where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." There has been no such enjoyment of the foul-water leat, which is the subject of the third count, as to give the right mentioned in the statute. It was a cut from a natural stream, the origin of which cut is shown: it was made by Hooper, the then occupier of the Carrancarrow Clay-works, in the year 1830; and, though the plaintiff had the use of it from the time he succeeded Hooper down to 1855, his enjoyment since that time has been subject to repeated interruptions. And the evidence shows that at no time had he an exclusive enjoyment. The enjoyment under the statute must be as of right, as well as without interruption. And here it was only by parol license. In Gale on Easements, 3d edit. 146, n. (e), it is said that "any occurrence during either the shorter or longer period, inconsistent with the *continuous* enjoyment of the easement claimed *as an easement* and *as of right*, is fatal to a claim under this section [s. 2], as, for instance, unity of possession *at any part of the period (Onley v. Gardiner, 4 M. & W. 499), or permission asked at any time during the period [*742 (Monmouth Canal Company v. Harford, 1 C. M. & R. 614; Beasley v. Clark, 2 N. C. 705, 3 Scott 258; per cur. in Tickle v. Brown, 4 Ad. & E. 383 (E. C. L. R. vol. 31), 6 N. & M. 230), or an agreement, whether written or verbal, made at any time within the period (Tickle v. Brown), or any other fact showing that at any time during the period the enjoyment could not then have been as of right: Warburton v. Parke, 2 Hurlst. & N. 64. All such matters are admissible in evidence upon a simple traverse of the enjoyment as of right and without interruption."

Coleridge, Q. C., and *Bullar*, in support of the rule.—Whatever may have been the position of other parties, the plaintiff clearly gained a right to the water mentioned in the third count by an uninterrupted enjoyment as of right from 1835, when he first obtained a sett of the Carrancarrow Clay-works, down to the year 1855. [BYLES, J.—The plaintiff's user following an user which was permissive only, could he acquire a right?] The plaintiff did not come in under Hooper. He succeeded Hooper in the occupation of the clay-works; but he came in under Lord Mount-Edgecumbe. There was no proof that the "furze-prickle" had ever been demanded of him: and he could not be in any way affected by Hooper's arrangement with Geach. [BYLES,

J.—How do you show an enjoyment for twenty years next before action brought?] There was no interruption acquiesced in. [*Karslake*, Q. C.—The defendants rely on the user being permissive only, and not as of right. BYLES, J.—The jury have found that the enjoyment was not as of right.] That, it is submitted, was not a question for them: there was no evidence to go to the jury. In *Tickle v. Brown*, 4 Ad. & E. 369 (E. C. L. R. vol. 31), 6 N. & M. 230, *743] it was held that the words “enjoyed by any person *claiming right*” applied to easements, in the 2 & 3 W. 4, c. 71, s. 2, and “enjoyment thereof *as of right*,” in s. 5, mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or on many; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription and adverse user, or by deed, or shall have been merely lawful so far as to excuse a trespass. Here, there was abundant evidence that the use of this water was claimed and enjoyed by Gaved openly and notoriously, as owner, and not by permission of anybody.

ERLE, C. J.—I am of opinion that this rule should be discharged. This was an action to recover damages for an interference with the plaintiff's right to a stream or watercourse; and the question is, whether the plaintiff had actually enjoyed the watercourse, claiming right thereto, for the full period of thirty years. I take the facts to be these:—Somewhere about the year 1830, Hooper, the then tenant of the Carrancarrow Clay-works, got permission from Geach, the tenant of Goonamarth, to cut the leat now in question from the brook or natural stream. As between Hooper and the owner of Goonamarth, therefore, there could be, from 1830 to 1835, no enjoyment as of right within the meaning of the 2 & 3 W. 4, c. 71, which, as was decided in *Tickle v. Brown*, 4 Ad. & E. 369 (E. C. L. R. vol. 31), 6 N. & M. 230, must be “an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, *744] “or on many; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser.” In the year 1835, Gaved, the plaintiff, took the Carrancarrow Clay-works under Lord Mount-Edgumbe, and with them had the enjoyment of the water of this stream or leat without interruption down to the year 1855, when the defendant Martyn for the first time interfered with that right, claiming to go back to the agreement between Geach and Hooper in 1830, and to stop the flow of water. The question is, whether that enjoyment in fact for more than twenty years established an indefeasible right in the plaintiff, or left it as a question for the jury whether the plaintiff was not limited to the same right as Hooper had, viz., by virtue of his agreement with Geach. The argument on the part of the plaintiff appears to be that the twenty years' enjoyment gave the right. The statute, however, does not say so. Before the statute, such a right could only be claimed by prescription, and might have been defeated by showing the origin of the enjoyment: and the 2d section provides that the claim shall not be defeated or destroyed by showing

only that the right was first enjoyed at any time prior to such period of twenty years (that is, by showing its origin); provided the person claiming has enjoyed claiming a right thereto. Was there, then, evidence for the jury that Gaved continued to enjoy the stream as Hooper had done before him? The leat was made by Hooper through the farm in his occupation; and, on the face of it, it was an artificial course, and the owner of the soil from which it was brought at the end of twenty years claimed a right to stop it. I think there was evidence from which the jury were warranted in finding that there had not been an enjoyment for twenty years "previously to the commencement of the action, by the plaintiff or those through which he claimed, as of right; but that the enjoyment was precarious, and procured by the permission of the owner of the soil. I do not lay it down as a matter of law that the plaintiff is affected by the license which Hooper had; but only that the learned judge was bound to leave the question to the jury, and that they were warranted in acting upon it as they have done. [*745]

WILLES, J.—I am of the same opinion. The court is asked by the first rule in this case to enter a verdict for the plaintiff on the third count, on the ground that the license granted by Geach, assuming it to have been granted, was merely a personal license to Hooper, and did not affect the plaintiff; or for a new trial, on the ground of misdirection as to the effect of that agreement. If the learned Baron had told the jury that the effect of the agreement between Hooper and Geach was, to stamp the character of precariousness on the enjoyment by Gaved, Hooper's successor, his direction might have been objectionable. The first question which he put to the jury seems rather to indicate that that is what was in his mind; but, when we turn to the fourth question, we find that that was not his intention. The fourth question depends upon this consideration, whether, upon the evidence before them, the jury should come to the conclusion that the enjoyment by the plaintiff was or was not precarious. The two questions presented by the rule, therefore, are in reality the same: and they amount to this, whether there was any evidence from which the jury might properly find that the enjoyment of the leat in question was precarious. A plaintiff who is seeking to establish an enjoyment for the statutable period of twenty years, must,—with this exception, that he need not satisfy the jury of the fact of there having been a lost grant, or that the enjoyment commenced before the time of legal memory,—make out that his enjoyment has been under a claim of right. And I apprehend it would clearly be competent, in answer to such a claim, to show that the enjoyment originated under an agreement with the tenant or owner of the servient tenement, and therefore was precarious and not as of right: and, upon proof of that fact, it would be for the jury to say whether the tenant of the dominant tenement had not continued the enjoyment in pursuance of a similar agreement, and whether it was not precarious. Here, there was abundant evidence from which the jury might, if they had thought proper, come to the conclusion that the enjoyment by the plaintiff was precarious. There is the agreement between Geach and Hooper, and the fact that the water was to be diverted by artificial means. Considering the jealousy which exists as to water rights, it is [*746]

difficult to say that the plaintiff's claim could ever have been a claim as of right. The circumstances which were obvious would naturally put him on inquiry whether the permission which Hooper had was by deed, or whether it originated only in a license. There was evidence from which the jury might well conclude that the plaintiff was content to go on as before, and that there was a tacit permission on the part of the owner of Goonamarth that things should continue as they were, subject, of course, to the conditions applying as between the plaintiff and Hooper. Upon these grounds, it appears to me that there was evidence upon which the jury might find the enjoyment of the foul leat to have been throughout an enjoyment by the permission of the owner of Goonamarth. In the case of *Toymbee v. Brown*, 3 Exch. 117, 125, counsel in argument put a question something like *747] "this, as to lights,—“Suppose,” he said, “an agreement by a tenant for life that he and his successors, owners of certain property, should allow the use of a light, could that agreement be set up to defeat the title of a party who had subsequently acquired a right to the use of the light by twenty years' enjoyment?”—which is the difficulty suggested by Mr. Coleridge here. To this Alderson, B., replies,—“If the parties had gone on acting upon the agreement, that would be evidence from which the jury might negative an adverse enjoyment, which is the foundation of the right.” So, here, the agreement between Geach and Hooper, with the other circumstances of the case, were evidence for the jury, and on which their verdict may well stand.

BYLES, J.—I am of the same opinion. Here the origin of the enjoyment of the stream was clearly shown by the admissions of the parties to have been a user by the permission of the tenant or the owner of the stream, or of both. Hooper confessedly had no right. The plaintiff succeeds Hooper generally: he does as Hooper did: he enjoys as his predecessor did. Now, mere enjoyment is not enough to give a right under the statute: it must be an enjoyment by a person claiming as of right. Until Martyn came in, in 1855, there is nothing to show that the plaintiff ever claimed or did anything more than his predecessor Hooper did. The question left, as far as the foul leat is concerned, was, “Has the plaintiff or those through whom he claims had an uninterrupted enjoyment of the leat as of right for more than twenty years?” The answer is in the negative. It seems to me that the question was rightly put to the jury, and that there was abundant evidence to warrant their answer. The rule was also moved on the ground that the verdict was against the evidence. I think, that, if *748] the plaintiff had notice of the circumstances under which Hooper's enjoyment of the leat began, his subsequent enjoyment was not under a claim of right. For these reasons, I am of opinion that the direction of the learned Baron was right, and that the finding of the jury on that direction was also right.

MONTAGUE SMITH, J., had been counsel in the cause, and therefore took no part in the judgment. Rule discharged.

Coleridge, Q. C., and Bullar, then proceeded to show cause against the defendant's rule.—The second rule relates to the clear water brought down to the plaintiff's works by the two launders. As to

these, the facts were, that the lower launder was placed by Hooper to carry the water from the spot marked on the plan as "the old woman's house" over the foul-water leat, and the upper launder by the plaintiff himself in the year 1842; and, as to both, the plaintiff has had uninterrupted user for more than twenty years, subject only since 1855 to the claim of Martyn. That, however, the jury have disposed of. The only questions which remain, therefore, are, whether the plaintiff, coming in after Hooper, enjoyed the water as of right or as a mere licensee, and whether the plaintiff could acquire any right in respect of the water brought down by the upper launder, inasmuch as it was taken from a tye or stream which was subject to the rights of the tin-borders. There was abundant evidence of actual enjoyment. It will be said, that, as the tin-borders had the water as incident to their rights as such, the plaintiff could derive no right as against the owner of the soil. If the plaintiff has had the requisite length of enjoyment to give him an easement, *his rights [*749 under the statute cannot be affected by the local and peculiar rights of the tin-borders.(a) The rights of a person in the position of the plaintiff are well defined in *Bright v. Walker*, 1 C. M. & R. 211. The tin-border had a right to use the water of the tye for streaming his ore: the payment to him by the plaintiff was merely for the purpose of inducing him to abstain from exercising his rights, it being important to the plaintiff to have the water brought down to his works in a clear state.

Karslake, Q. C., and Pinder, 1: support of the rule.—The plaintiff had no such interest in the water in question as to entitle him to maintain this action. The material facts are these:—Hooper was tenant of the whole of Carrancarrow farm. The plaintiff, as the tenant of the Carrancarrow Clay-works, claims the right to dig and work for clay under Hooper's farm,—an incorporeal hereditament. The legal incidents of such a license as the plaintiff had are clearly defined in *Harker v. Birkbeck*, 3 Burr. 1556, *Doe d. Hanley v. Wood*, 2 B. & Ald. 724, *Muskett v. Hill*, 5 N. C. 694, 7 Scott 855, and *Laing v. Whaley*, 3 Hurlst. & N. 675. In *The Stockport Waterworks Company v. Potter*, 3 Hurlst. & Colt. 300, it was held that the abstraction of water from a natural stream, openly and under a claim of right for a period of twenty years, to a tenement not abutting on the stream, will create no easement to have pure water flow down the stream to the point of abstraction. The plaintiff's right to the water could not be claimed as appurtenant to his right to dig the clay. As to the upper launder, which was put up by the plaintiff in 1842 for the purpose of conducting the water from the tin-tye,—an open cut or drain made *by the tin-borders for the purpose of streaming their tin,— [*750 down to the Carrancarrow Clay-works, twenty years' enjoyment could confer no right. It was a mere artificial stream, which the tin-borders might have diverted whenever they pleased. There was, therefore, no evidence of a user as of right which could properly be left to the jury. In *Arkwright v. Gell*, 5 M. & W. 203, 231, Lord Abinger says,—“The stream upon which the mills were constructed was not a natural watercourse, to the advantage of which, flowing in its natural course, the possessor of the land adjoining would be entitled, accord-

(a) For a careful exposition of the rights of tin-borders, see *Rogers on Mines* 247.

ing to the doctrine laid down in *Mason v. Hill*, 5 B. & Ad. 1 (E. C. L. R. vol. 27), and in other cases. This was an artificial watercourse, and the sole object for which it was made, was, to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral field drained by it: and the flow of water through that channel was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine-owners required it; and, in the ordinary course, it would most probably cease when the mineral ore above its level should have been exhausted." In *Wood v. Waud*, 3 Exch. 748, it was held that no action will lie for an injury by the diversion of an *artificial* watercourse, where, from the nature of the case, it is obvious that the enjoyment of it depends upon temporary circumstances, and is not of a permanent character, and where the interruption is by a person who stands in the nature of a grantor. So, in *Greatrex v. Hayward*, 8 Exch. 291, it was held that the flow of water from a drain made for the purposes of agricultural improvements, for twenty years, does not give a right to the neighbour, so as to preclude the proprietor from *751] altering the level of his drain for the improvement of his *land. Lord Campbell, referring to those cases in *Beeston v. Weate*, 5 Ellis & B. 986, 996 (E. C. L. R. vol. 85), says: "In those cases, regard was had to the water being obtained artificially by the owner of the servient tenement, rather than to the water running through an artificial cut. Here, the water in question is part of the water of a stream which has flowed on the surface of the country from the time that our globe took its present conformation." The cases are all collected in the 3d edit. of *Gale on Easements*, 263 et seq. The result is that one who has made an artificial cut for a temporary purpose cannot claim a prescriptive right under the statute.

ERLE, C. J.—As to the claim in respect of the water carried over the lower launder, it seems to me that the verdict ought to stand. Water has been brought to the clay-works of the plaintiff, and he, being the occupier of those works, and having a right to the easement of digging clay on Hooper's farm, may maintain a valid claim to the water in respect of such occupation. Then, does the evidence show, that, though he has enjoyed the easement for more than twenty years without interruption, and as of right, he could not acquire an indefeasible right to it, because the water was collected in land which was subject to the claims of tin-borders. If he had himself dug the channel and conducted the water along it for more than twenty years without interruption, he would have acquired a right to it. But it is said that he could not acquire a right here, because the water had its source in land which was subject to the contingent rights of the tin-borders, provided they chose to exercise them: and it is said that the right to the water could not vest absolutely in any person where *752] *such a claim existed. I do not, however, think that argument tenable. If the rights of the tin-borders are in operation, the custom of Cornwall, which may be called the common law of Cornwall, may operate in the way suggested. But, if they are not in operation, the general law of the land applies to Cornwall as to any other county. The man who has dug a channel, and has conducted water along it for twenty years without interruption, acquires a right

to it, though its source may be in lands which are subject to tin-borders' rights. This will entitle the plaintiff to a verdict in respect of the lower launder. As to the upper launder, the court will take time to consider.

WILLES, J.—I am of the same opinion. As to the first question, whether the plaintiff could maintain the action in respect of his possession of the Carrancarrow Clay-works, I am clearly of opinion that he can. He was the occupier of the land through which the water flowed; and, as a general rule, the occupier of land through which water flows may maintain an action for the diversion of it. The plaintiff's right to the uninterrupted flow of the water is not diminished by the circumstance of his having an additional right, viz. the right of searching for clay under other lands not in his occupation. If we were to hold that such an occupation, ancillary to the enjoyment of mineral rights, was not sufficient to maintain this action, we should in effect be saying that there never could be a right of this kind acquired by occupiers, under Lord Tenterden's Act. As to the second question, whether or not the enjoyment of the water was contentious, and therefore not an enjoyment as of right, since the year 1855, it is obvious that that must always be a question for the jury; and the jury have determined that, by finding that the enjoyment was of *right. As to the third question, viz. whether the artificial character of the watercourse in its origin prevented the acquisition of a right to it by prescription, a different question arises with respect to the upper launder, the water flowing over which was supplied from an artificial cut called a tin-tye, which had been made by the tin-borders for the purpose of streaming tin, from that which presents itself as to the lower launder, the flow over which was procured by an adit driven by the person claiming the right to the water into land not subject to tin-borders' rights. As to the last-mentioned launder, the flow of water was no doubt intended to be of a permanent character, and therefore subject to the law of prescription. That is the distinction pointed out in *Wood v. Waud*, 3 Exch. 748. In *Magor v. Chadwick*, 11 Ad. & E. 571 (E. C. L. R. vol. 39), it was held, that, in the absence of a special custom, artificial watercourses are not distinguished in law from natural ones, and that a title may be gained by twenty years' user as well to the former as to the latter. This was supposed to be at variance with what had been laid down by the Court of Exchequer in *Arkwright v. Gell*, 5 M. & W. 231. But the two cases are reconciled by the judgment of Parke, B., in *Wood v. Waud*, 3 Exch. 777, where that learned judge says: "We entirely concur with Lord Denman, C. J., that 'the proposition that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible:' but, on the other hand, the general proposition, that, *under all circumstances*, the right to watercourses, arising from enjoyment, is the same whether they be natural or artificial, cannot be sustained. The right to artificial watercourses, as against the party creating them, surely *must depend upon the character of the watercourse, whether it be of a permanent or temporary character, and upon the circumstances under which it is created. The

enjoyment for twenty years of a stream diverted or penned up by permanent embankments, clearly stands upon a different footing from the enjoyment of a flow of water originating in a mode of occupation or alteration of a person's property, and presumably of a temporary character, and liable to variation." The stream running over the lower launder, though artificial in its origin, was subject to the law of prescription, and the plaintiff has acquired a right to it, subject to the operation of the fourth question, whether the circumstance of its having its origin in the tin-bounds prevents the application of the Prescription Act to the claim. I am of opinion that it does not. The right of the tin-borders by custom is one apart from the ownership of the soil, or the enjoyment of any right connected with the soil, with the exception of the single right to search for tin and to take all reasonable means for producing it, subject to the payment of a toll to the owner of the land. I apprehend that the rights of the owner of the land, and any incorporeal rights or hereditaments arising out of it, may be determined by the ordinary law under the Prescription Act, irrespective of the rights of the tin-border, which may not be inaptly described as rights paramount under the custom. I do not see why the inhabitants of Cornwall should be in a worse position with reference to the acquisition of prescriptive rights to water than the inhabitants of other parts of the kingdom. With respect, therefore, to the lower launder, I concur with my Lord in thinking that the rule should be discharged: and, as to the upper launder, the court will take time to consider. As to the payments made to Hooper, but little reliance *755] was placed in the argument on them. Indeed this point was disposed of by the finding of the jury that the payment was not for the use of the water, but in order to prevent its being fouled, which might exist as a distinct right, according to *Carlyon v. Lovering*, 26 Law J., Exch. 251.

BYLES, J.—I agree with all that has fallen from my Lord and my Brother Willes as to the lower launder. The question raised as to the upper launder requires more consideration. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court upon the point reserved:—

The point remaining for decision is, the right of the plaintiff to maintain his action on the count for removing the upper launder. The facts for the plaintiff are, that this launder was placed in 1842 to convey water in the leat to the plaintiff's works, and, notwithstanding the evidence of contention between the parties, we take the jury to have decided the question of fact rightly, that the enjoyment of this water by the plaintiff was as of right, without interruption: but their verdict was taken subject to the leave reserved to the defendant's counsel to move to reverse that verdict, if the facts relied on for the defendant negatived in point of law the existence of the right claimed by the plaintiff.

The result of those facts is, that the water in the stream in question was brought to the surface artificially by the operations of miners, and conveyed in the tye or open adit to the part of the brook where the upper launder was afterwards placed so as to receive it, and that the use of the stream, which might include a change of its direction, had not been abandoned by the miners.

*It appeared that the land where the facts relevant to the right to the stream in the upper launder took place, was within the tin-bounds, which at the earliest period mentioned in the evidence belonged to William Hooper, and had passed from him, through mesne assignments to the defendants. The mouth of the adit from which the stream of the tye flowed, the course of that stream from thence over the surface in the tye either to tin stream works or to the Carrancarrow Clay-works, or to the brook, or to and beyond the upper launder towards the Carrancarrow Clay-works of the plaintiff, were all within the limits of the tin-bounds above mentioned, and so was subject to the rights of the owner thereof. It appeared also that the owner of the tin-bounds had worked for tin, and had de facto exercised his rights over the water from time to time during all the time to which the evidence related. In 1826 and 1827, one Vivian had paid the bound-owner 4*l.* a year for taking the water to and from the tye to the Cawn Clay-works. One Higman had paid annually 10*l.*, first to Hooper the father, and afterwards to Hooper the son, for taking the water of the tye, down to 1851; and the plaintiff himself in 1852 agreed to pay to the bounder 4*l.* annually, and did pay for three quarters. [*756]

It is true that these payments were made to the bounder to induce him to omit the exercise of his right to use the stream for tin, whereby the water would have been fouled; and that the water itself was not the subject of the agreement. But the point to be ascertained, is, whether the miners had abandoned their right and interest in the stream brought to the surface by mining operations; and, if the tin-bounder claimed and exercised the right of using the stream within the bounds, when, where, and how he chose, he had not abandoned his right thereto.

*It is not necessary here to consider further the rights of owners of tin-bounds; but it is not superfluous to add that the right to tin-bounds is most clearly "the law and privilege of the stannary, and as such part of the law of England,"—Co. Litt. 11 b; and that a judge administering the law of England is as much bound within the stannaries to protect the rights derived from the stannary laws, and to learn from those laws what those rights are, as in Kent he is bound to know what is the tenure of land there, and what are the rights incidental to that tenure. [*757]

The antiquity and the operation of the stannary laws, both generally and also in relation to tin-bounds, are considered, and the authorities are collected in the report of *Vice v. Thomas*, published by Mr. Smirke, vice-warden of the stannaries, in 1848.

These being the facts in relation to the stream, the question remains, whether the plaintiffs, by turning that stream from the brook over the upper launder into the leat leading to his works, and enjoying the use thereof without interruption for more than twenty years, acquired a right thereto under the Prescription Act. Although the jury have found that he did this as of right, that must be taken to be a finding of the fact of the enjoyment, subject to the point reserved for the defendant, whether such enjoyment of a stream of this character could be by law as of right, within the meaning of the Prescription Act. And we are of opinion that the plaintiff acquired no right to

this stream by the user thereof for twenty years, because the stream was an artificial stream made to flow over the defendant's land by the operations of miners, and the miners had not permanently abandoned their right of control over the water in the stream when the plaintiff diverted it by the upper launder to his works.

*758] Rights and liabilities in respect of artificial streams *when first flowing on the surface are entirely distinct from rights and liabilities in respect of natural streams so flowing. The water in an artificial stream flowing in the land of the party by whom it is caused to flow, is the property of that party, and is not subject to any rights or liabilities in respect of other persons. If the stream so brought to the surface is made to flow upon the land of a neighbour without his consent, it is a wrong for which the party causing it to so flow is liable. If there is a grant by the neighbour, the terms of the grant regulate the rights and liabilities of the parties thereto. If there is uninterrupted user of the land of the neighbour for receiving the flow as of right for twenty years, such user is evidence that the land from which the water is sent into the neighbour's land has become the dominant tenement, having a right to the easement of so sending the water, and that the neighbour's land has become subject to the easement of receiving that water. But such user of the easement of sending on the water of an artificial stream is of itself alone no evidence that the land from which the water is sent has become subject to the servitude of being bound to send on the water to the land of the neighbour below. The enjoyment of the easement is of itself no evidence that the party enjoying it has become subject to the servitude of being bound to exercise the easement for the benefit of the neighbour. A right of way is no evidence that the party entitled thereto is under a duty to walk; nor a right to eaves-dropping on the neighbour's land, that the party is bound to send on his rain-water to that land. In like manner, we consider that a party by the mere exercise of a right to make an artificial drain into his neighbour's land either from mine or surface, does not raise any presumption that he is subject to any *759] duty to continue his artificial drain, by twenty years' user, *although there may be additional circumstances by which that presumption would be raised or the right proved. Also, if it be proved that the stream was originally intended to have a permanent flow, or if the party by whom or on whose behalf the artificial stream was caused to flow is shown to have abandoned permanently without intention to resume the works by which the flow was caused, and given up all right to and control over the stream, such stream may become subject to the laws relating to natural streams. But the facts here do not raise either of these points.

The law relating to natural streams is entirely different. The flow of a natural stream creates natural rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality. These natural rights and liabilities may be altered by grant or by user of an easement to alter the stream, as, by diverting, or fouling, or penning back, or the like. If the stream flows at its source by the operation of nature, that is, if it is a natural stream, the rights and liabilities

of the party owning the land at its source are the same as those of the proprietors in the course below. If the stream flows at its source by the operation of man, that is, if it is an artificial stream, the owner of the land at its source or the commencement of the flow, is not subject to any rights or liabilities towards any other person in respect of the water of that stream. The owner of such land may make himself liable to duties in respect of such water, by grant or contract: but the party claiming a right to compel performance of those duties must give evidence of such rights, beyond the mere suffering by him of the servitude of receiving such water.

The rights of the plaintiff in respect of the two *launders exemplify this distinction. For the lower launder, the plaintiff [*760 had made a watercourse on the defendant's land, and collected the water of natural springs therein, and brought it to the launder. For the upper launder, the plaintiff had gone to the edge of the defendant's land, and received thence into the launder the water of the tye, where it would have flowed into the natural stream and become part thereof. In respect of the lower launder, there was dominant actio and servient patientia for twenty years, and so there was good evidence of an easement for the plaintiff, the dominant tenant. In respect of the upper launder, there was no dominant actio by the plaintiff nor servient patientia by the defendant on the defendant's land in respect of the stream while on that land, and so there was no presumption of a grant by the defendant, no evidence of a right in the plaintiff.

For the law relating to natural streams on the surface, we refer to *Mason v. Hill*, 5 B. & Ad. 1 (E. C. L. R. vol. 27), 2 N. & M. 347, 3 B. & Ad. 304 (E. C. L. R. vol. 23). For the law relating to subterraneous water, to *Chasemore v. Richards*, 7 House of Lords Cases 349 (Exchequer Chamber, 2 Hurlst. & N. 168). For the law relating to artificial streams, we refer to *Arkwright v. Gell*, 5 M. & W. 203, *Magor v. Chadwick*, 11 Ad. & E. 571 (E. C. L. R. vol. 39), 3 P. & D. 367, and *Wood v. Waud*, 3 Exch. 748. And, for a clear exposition of the whole law on this class of easements and servitudes, we refer to *Gale on Easements*, 3d edit. p. 263.

In *Arkwright v. Gell*, the law relating to artificial streams is expounded with clearness and vigour. The important and extensive rights and interests connected with mining are protected in due relation to the rights of surface owners. In this case, the question arose between the surface owner and the mining owner: and it was held that the mining owner who had brought the water to the surface on the plaintiff's land for *draining a mine, might divert it where [*761 deeper draining was required; and all the mines of the district that might be unwatered by the drain were properly treated as one interest.

In *Magor v. Chadwick*, no law is expounded, but doubts upon the law are created by dissent from some governing propositions laid down in *Arkwright v. Gell*. The judge at the trial had not recognised any distinction between natural and artificial streams; and the court refused a new trial for misdirection, on the ground that the blame of any miscarriage, if miscarriage there was, ought to be laid on the counsel who argued at the trial. The result of that case would have been pernicious to all miners and all proprietors improving land by

draining. But it was followed by *Wood v. Waud*, in which the propositions laid down in *Arkwright v. Gell*, relating to the difference between artificial and natural streams, are re-affirmed. In this case the question arose between two proprietors of the surface, over whose land an artificial stream flowed on its way to the natural stream; and it was held, that, as between them, the law relating to natural streams did not govern.

This case was followed by *Greatrex v. Hayward*, 8 Exch. 291, in which it was decided that a drain on the surface made for the purpose of draining the land of the maker thereof, is an artificial stream, and is not subject to the law relating to natural streams, and might be diverted after twenty years' flow into the plaintiff's land, for the purpose of improving the drainage of the defendant's land.

These cases have been followed by others collected in the treatise above mentioned: and we consider that the distinction between natural and artificial streams is established in our law, and that the flow from *762] the upper launder was not such an artificial stream that *an easement could be acquired therein by twenty years' user.

For these reasons we consider that the plaintiff's case as to the upper launder failed: and that the rule for entering the verdict on the count relating thereto for the defendant must be made absolute.

Rule absolute accordingly.(a)

(a) See *Rawstron v. Taylor*, 11 Exch. 369.

*763] *IN THE EXCHEQUER CHAMBER.

BEVAN v. WHITMORE.

An official assignee of a district court of bankruptcy having given his assent to the bringing of an action in his name jointly with that of the trade-assignee for the recovery of part of the bankrupt's estate, and, the action proving unsuccessful, the trade-assignee having paid the costs:—Held,—affirming the judgment of the court below,—that he was entitled to sue the official assignee for contribution.

THIS was an action brought by the plaintiff, who was the trade-assignee under a fiat against one Foster, a merchant at Birmingham, to recover from the defendant, the official assignee, the sum of 127*l.*, being a moiety of the costs incurred in an action brought by both as assignees of one Dowling, under the circumstances stated in the report in the court below, 15 C. B. N. S. 433 (E. C. L. R. vol. 109).

The plaintiff had paid the whole of the costs, and the Court of Common Pleas held that he was entitled to maintain an action against the official assignee for a moiety of the sum so paid by him.

The defendant appealed against this decision, and the case was argued in the Exchequer Chamber at the sittings in error after Trinity Term, 1864, before Pollock, C. B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., and Shee, J., by *Lush*, Q. C., for the appellant (the defendant below), and by *Quain*, for the respondent (the plaintiff below), when the judgment of the court below was unanimously affirmed.

Judgment affirmed.

***CAMERON v. THE CHARING-CROSS RAILWAY COMPANY. Feb. 6. [*764**

BOURHILL v. THE SAME.

Held by the Exchequer Chamber,—reversing the judgment of the Court of Common Pleas,—that an injury to the goodwill or a loss of profit in the business of a shop, caused by an obstruction, whether permanent or temporary, of a highway, in the lawful execution of the works of a railway company, where no part of the land on which the business is carried on is taken or otherwise injuriously affected, is not the subject of compensation under the 68th section of the Lands Clauses Consolidation Act, 1845.

In this case the Court of Common Pleas held, upon the authority of *Chamberlain v. The West End of London and Crystal Palace Railway Company*, 2 Best & Smith 605, 617, and *Senior v. The Metropolitan Railway Company*, 2 Hurlst. & Colt. 258,—that loss of trade occasioned by the obstruction of a passage leading to a thoroughfare in which the plaintiff's shop was situate, whereby the access of customers was interfered with, was a particular damage in respect of which the parties were entitled to compensation under the 68th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18: see 16 C. B. N. S. 430 (E. C. L. R. vol. 111).

The defendants appealed against this decision, and the case now came on for argument in the Exchequer Chamber, before Pollock, C. B., Crompton, J., Channell, B., Blackburn, J., Mellor, J., and Pigott, B., when

H. Shield, for the appellants, relied upon the decision of the Exchequer Chamber in *Ricket v. The Metropolitan Railway Company*, where it was decided at the same sittings (since reported, 12 L. T. N. S. 79), by the majority of the court, that an injury to the good-will or a loss of profit in the business of a house, caused by an obstruction of a highway, in the lawful execution of the works of a railway company, where no part of the land whereon the business is carried on is taken or otherwise injuriously affected, is not the subject of compensation under the Lands Clauses Consolidation Act, 1845.

**H. Giffard*, Q. C. (with whom was *MacLachlan*), contra, [*765 sought to distinguish *Ricket v. The Metropolitan Railway Company* from the present case, by the fact that there there was not, as here, a permanent obstruction of the way.

But the whole court thought that it was impossible to distinguish the two cases, and that the judgment of the court below must be reversed.

Judgment reversed.

DOGGETT v. CATTERNS. Feb. 6.

Held by the Exchequer Chamber,—reversing the judgment of the Common Pleas,—that the habitual use of a spot in a public park for the receiving of deposits, to return a larger sum on the contingency of a particular horse winning a race, is not the using of a "place" for such purpose, within the 16 & 17 Vict. c. 119, s. 1.

THE question in this case was, whether the habitual use of a spot under a tree in Hyde Park for the receiving of deposits, to return a larger sum on the contingency of a particular horse winning a race,

was the using of a "place" for such purpose, within the prohibition of the 16 & 17 Vict. c. 119, s. 1, which, after reciting that "a kind of gaming has of late sprung up, tending to the injury and demoralization of improvident persons, by the opening of *places called betting-houses or offices*, and the receiving of money in advance by the *owners or occupiers of such houses or offices*, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and like contingencies,"—"for the suppression thereof," enacts that "no *house, office, room, or other place* shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on *766] behalf of such owner, occupier, or keeper, or *person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance, and contrary to law."

The Court of Common Pleas having held that the spot in question was a "place" within the meaning of the statute (17 C. B. N. S. 669 (E. C. L. R. vol. 112),) the defendant appealed; and the case was argued in the Exchequer Chamber at the sittings after Hilary Term, 1865, before Pollock, C. B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., Mellor, J., and Pigott, B.

Hayes, Serjt. (with whom was *B. Greene*), for the appellant, submitted that the word "place" in the statute must be restricted to places ejusdem generis with "house," "office," and "room;" and that an open space in a public park could not have an owner or occupier. [BRAMWELL, B.—Or be a "common gaming-house" within s. 2.]

Yeatman, contra, insisted that the word "place" was to be understood in its ordinary and accustomed sense, and need not be confined *767] to house, office, room, *or other place of which there might be an owner or occupier.

POLLOCK, C. B.—I am of opinion that the judgment of the Court of Common Pleas must be reversed. The opinions of the learned judges of the court below proceed on the ground that the spot on which the defendant exercised his calling was a "place" within the meaning of s. 1 of the statute. I concur in that view so far that I think the place being an open one, and not being a "house," "office," or "room," would not alone prevent it from being a place within that section. I think, however, to satisfy the words, it must be a place which is capable of having an owner or occupier, which this place clearly was not.

CROMPTON, J.—I am of the same opinion. The preamble to the

statute refers to the owners and occupiers of betting-houses or offices and persons acting on their behalf. The words "such person," in s. 5, refer to "any person being the owner or occupier of any house, office, room, or other place," in s. 4. The defendant here clearly does not come within that description.

BRAMWELL, B.—I agree that the judgment should be reversed, but not on the ground that a person, to come within ss. 4 and 5 of the statute, must be an owner or occupier of the place, or a person acting on behalf of the owner or occupier. The object of the statute was to put down ascertained places of resort for gambling. I think the place in question was not a place of that sort within the contemplation of the act.

The rest of the court concurring,—CHANNELL, B., and BLACKBURN, J., for the reasons given by POLLOCK, C. B., and MELLOR, J., and PIGOTT, B., for that given by BRAMWELL, B.,—

Judgment reversed.

*ANDREWS and Others v. LAWRENCE and Another. [*768

A. agreed to do for B. & Co. all the wood-work on an iron ship which B. & Co. were building for M. & Co., according to a certain tender, the whole to be completed for 3800*l*. The contract or tender contained the following clause,—*"Any important work not mentioned in this tender that may be required to be done by the owners, to be paid for by them, in addition to the amount herein specified."* The work was undertaken by A. for B. & Co. upon the faith of a guarantee by C., as follows,—*"In consideration of your contracting with Messrs. B. & Co. for the wood-work of an iron ship now building by them for Messrs. M. & Co., we hereby guarantee the payment to you according to the contract."* The word "important" in the contract was inserted by A., with the consent of B. & Co., after the guarantee was signed by C.:—

Held, that the contract bound B. & Co. for extra work done, they being the persons referred to therein as "the owners;" and that the insertion of the word "important" had no material effect upon the liability of C. under the guarantee.

Affirmed in the Exchequer Chamber.

THIS was an action upon a guarantee. The declaration stated that the defendants, in consideration of the plaintiffs' contracting with Messrs. H. M. Lawrence and Co. for the wood-work of an iron ship then building by them for Messrs. Moore & Co., guaranteed the payment to the plaintiffs by the said H. M. Lawrence & Co., according to a certain contract: Averment, that they, the plaintiffs, did contract with the said H. M. Lawrence & Co. for the said wood-work of the said ship, and there remained unpaid to the plaintiffs by the said H. M. Lawrence & Co. 205*l*. 18*s*. 5*d*., which sum was due and payable according to the said contract from the said H. M. Lawrence & Co. to the plaintiffs: Breach, that, although the plaintiffs had done all things, and all things had happened, and all times had elapsed necessary to entitle the plaintiffs to sue the defendants on the breach of promise in that count complained of, yet the defendants had not indemnified the plaintiffs according to the said promise, and had not paid to the plaintiffs the sum of 205*l*. 18*s*. 5*d*., or any part thereof. Money counts, and accounts stated.

The defendants pleaded,—first, that they did not promise as alleged,—secondly, to the first count, that the plaintiffs did not contract with the said H. M. Lawrence & Co. for the said wood-work of the said

ship, as alleged,—thirdly, to the first count, that before action, the said H. M. Lawrence & Co. satisfied and discharged by payment all
 •769] the moneys due and *payable according to the contract from the said H. M. Lawrence & Co. to the plaintiffs,—fourthly, never indebted. Issue thereon.

The cause was tried before Shee, J., at the Spring Assizes at Liverpool in 1864, when the following facts appeared in evidence:—The plaintiffs are ship-chandlers and ship-smiths, carrying on business in Liverpool, and the defendants are merchants also at Liverpool. The action was brought to recover the sum of 20*l.* 16*s.* 5*d.* for extra work done by the plaintiffs to an iron ship called the Bianca, and which they claimed from the defendants under the guarantee hereinafter mentioned.

James Andrews, one of the plaintiffs, who was called as a witness, stated, that, in August, 1862, Mr. H. M. Lawrence, a brother of the defendants, carrying on by himself the business of an iron-ship-builder at Liverpool, under the style of H. M. Lawrence & Co., informed him that he had entered into a contract to build, and was building, for Messrs. Moore & Co., an iron ship called the Bianca, and applied to him to send in a tender for the wood-work; that he knew that H. M. Lawrence had been in difficulties, and said that he should require a guarantee, and he afterwards, viz. on 25th of August, sent to the said H. M. Lawrence the following tender:—

“Liverpool, 25th August, 1862.

“Messrs. H. M. Lawrence & Co.

“We will engage to do the following wood-work at an iron ship now building by you, viz.:

“*Decks.* To be of yellow pine. Main deck 6×4, one plank of teak 8×4 each side of hatches, right fore and aft, for ring bolts, and one 8×4 next the water-ways. Quarter deck 6×3½: topgallant fore-castle 6×3½, about 30 feet long, also a laid between decks 6×3, to be
 •770] well seasoned. Store rooms in each end. *Deck 6×3, free from objectionable knots, and well fastened with screw-bolts and nuts; and upper and forecastle deck and quarter-deck to be planed and caulked. Upper deck to be caulked twice, and plugged, set in white lead; ’tween decks once caulked; upper decks to have two coats of oil.

“*Ceiling.* To be of pinch pine 3 inches thick to upper part of bilge, to be made in square hatches in flat of bottom, with small ring bolts let in flush for lifting them off. The remainder to be alternately ceiled 6in. wide and 6in. space, with 2in. yellow pine. The whole to be well fastened with screw-bolts and nuts, and to be planed.

“*Main-rail.* Of green heart 18×4, or wide enough to take pins in way of rigging, secured to an iron on bulwarks by bolts and nuts.

“*Topgallant bulwarks.* Fifteen inches high, the rail and stauncheons of teak, the rail 7×3, boarded with yellow pine 2in. thick, and to be neatly panelled.

“*Windlass and bitts.* Main piece of green heart. A spindle of 4½in. iron running through, to be cased with 4in. elm; to find plates and bushes, and two Normans (*the owners finding patent purchase-lever*). Cast whelps and chain stoppers. The bitts of green heart 22×8, with facing pieces same thickness, well secured with knee before.

" *Catheads*. Of African oak 13×14, with hoop on the end of each: two cast catfaces, and two patent stoppers, sheathing and fixing up.

" *Bitts*. A pair of forestay-bitts of green heart 14in. square, going thro' to 'tween-deck beams, with cross-pieces 16in. thick, as per margin.

" *Bitts and taffrail*. At the mainmast, two of green heart 14×11 with rail 5in. thick, of green heart, set in casting, with sheaves.

" *Bitts aft*. Two of green heart 14in. square, to go down to 'tween-decks.

" *Topgallant forecastle*. Sill 10×6 of green heart fitted for the crew, about 30ft. long on load line under the main deck, and decks laid under for stores and coals; the forecastle to be lined and fitted with 20 berths; to find and put up the front of forecastle. [*771

" *Houses on Deck*. To be made as per plan complete. The sills of green heart 10×8, beams 7×6, and staunchcons of 6×6 pitch-pine. Decks of yellow pine 6×3, the sides and ends 2in. pitch-pine. Bulkhead in the fire-house fitted with 4 berths, and 4 side-lights divided for galley, and the galley lined with sheet iron inside, and the floor tiled.

" *Steering-gear*. Capstans, 3; winches 2; improved patent pumps, fixing only, the owners finding the articles.

" *Chain-locker*. Of sufficient size to hold the chains, and fitted with pipes, manhole, &c., complete; to be planked with 2in. elm.

" *Hawse-pipes, bitts, &c.* Two on each side of cold-blast iron, forward, fitted through a green heart chock above the deck, well secured; a cast-iron pipe riveted to the bulwarks on each side between the windlass and foremast, for breast-ropes, with iron butts to correspond. Also a pipe on each side, with bitts before the front of poop, for breast-ropes. Also a pipe with green heart bitts, or iron if preferred by owners on each side through the stern, above poop-deck. The whole of the bitts to be well secured with screw-bolts and nuts.

" *Warping-chocks*. Two cast-iron warping chocks, one on each side, forward, fitted and completed.

" *Boats*. Two; one 26 feet long-boat, and one 23 feet pinnace-boat, carver built, one 22 feet gig, and one 20 feet jolly-boat: all to be copper-fastened, and to have set of oars, boat-hooks, and rowlocks, and spars to long-boat complete, and chocks and cover for the long-boat.

" *Sundries*. To find bucket-rack, flag locker, all ladders required, say, two side-ladders, two poop-ladders, two forecastle ladders, and one accommodation-ladder, the two poop and the two side-ladders to be of teak-wood, and the remainder to be made of pitch-pine. [*772

" To find teak-wood carved gangway boards, brass mounted. To find skid and shoe to go on the main rail, of elm. To find and put in as many deck-lights as may be required. To find all hatch-fastenings, boat-gripes, beams for boats to rest-on, with iron pillars or staunchcons to the same. All brass locks and hinges to hatch-ways and doors on deck. To find two pair of iron davits made of 4in. iron, with blocks and wrought-iron hangings complete. To find two patent cathead stoppers, and shank painters. To find and fix six scuppers in the lower deck, with pipes to carry off the water, and two

scuppers in the fore-castle. To find and put a scuttle in the fore-castle. To galvanize iron-work to the amount of 15*l*. To find green heart pump-chock and elm casing for the two main pumps. To find yellow-pine timber for the figure head, taffrail, trail-boards, and flights, with English oak head-knees or cheeks, and head timbers, including materials and labour, but not carving. To find a teak-wood wheel, cover, and grating complete.

"Any *important* (a) work not mentioned in this tender that may be required to be done by *the owners*, to be paid for by them, in addition to the amount hereinafter specified.

"The materials and workmanship to be of the best description, and the whole to be completed to the satisfaction of the surveyors.

"We will complete the whole of the aforesaid work, finding materials *773] as per margin, and paying all wages, *for the sum of 3800*l*.; to be paid in two equal payments, one-half in cash, and one-half in good bills not exceeding three months' date,—the first payment to be made when the ship is launched, and the second payment when our work is finished.

"JAMES ANDREWS & Co."

The said H. M. Hugh Lawrence accordingly applied to the defendants for a guarantee, and on the 8th of September, 1862, obtained from them the following guarantee:—

"London Works, Sefton Street, Liverpool,
"8th September, 1862.

"Messrs. J. W. Andrews & Co.

"Gentlemen,—In consideration of your contracting with Messrs. H. M. Lawrence & Co., for the wood-work of an iron ship now building by them for Messrs. Moore & Co., we hereby guarantee the payment to you according to the contract.

Yours faithfully,

"E. LAWRENCE & Co."

The contract referred to in such guarantee was the tender above set out: and the tender, with the guarantee signed by the defendants, was afterwards, on the same day, brought by H. M. Lawrence to the witness; and, on his handing him the guarantee, the tender was signed by him, and the word "*important*" added in the place where that word appears in italic, at the suggestion of H. M. Lawrence.

The sum of 3800*l*. mentioned in the tender was duly paid: and this action was brought to recover the further sum of 20*l*. 16*s*. 5*d*. for extra-work done by the plaintiffs to and in respect of the Bianca.

The witness was cross-examined as to whether the items in the particulars were wood-work, but it was finally agreed at the suggestion of the learned judge that the items should be referred to arbitration, in *774] the *event of its being decided that the plaintiffs were entitled to recover for extra-work from the defendants.

H. M. Lawrence was then called by the defendants; and he deposed that he contracted with Moore & Co. to build the Bianca, and applied to the plaintiffs to tender for the wood-work of the Bianca; that the word "*important*" was inserted in the contract entirely without the knowledge of the defendants, and without their being communicated with; and that the plaintiffs were ship-smiths as well as ship-car-penters.

(a) This word the witness Andrews swore was not in the tender when sent by him; nor was it at that time signed.

The learned judge directed the jury to find for the plaintiffs for the sum claimed, subject to the agreement for arbitration, and reserved the defendants leave to move to enter a verdict for them, if the court should be of opinion that on the true construction of the guarantee and the contract or tender, the defendants were not liable for extras, or that the addition of the word "important" was an alteration of the contract which discharged the defendants from liability.

E. James, Q. C., in Easter Term, 1864, accordingly obtained a rule nisi to enter a verdict for the defendants or a nonsuit, on the grounds,—"first, that the defendants were not liable for any extras,—secondly, that the defendants were not liable, by reason of the contract being vitiated by the alteration in a material particular, viz., by the insertion of the word 'important.'"

Crompton Hutton, in the following Easter Term, showed cause.—The first question is, whether there was any contract binding the surety, the defendant, to pay for anything beyond the 3800*l.* mentioned in the tender. That extras were contemplated by the contract, is clear from the clause which provided that "any important work not mentioned in the tender, that might be required to be done *by the owners*, should be paid for by them in addition to the amount thereafter specified." Although there was no evidence that the tender was shown to the defendant before he agreed to become surety, the language of the guarantee shows that it must have been. The words "by the owners" in that clause, do not refer to Messrs. Moore & Co., for whom the ship was being built, but to H. M. Lawrence, the builder. The plaintiff could not have recourse to Moore & Co. for the price of the extras. [BYLES, J.—Supposing you are right in that, does not the altered contract impose upon the surety a different degree of liability?] It was altered before it was delivered out as a perfect contract. And, besides, the insertion of the word "important," so far from increasing, materially decreased the liability both of principal and surety. That the *delivery* of the contract is the important thing, is clear from the authorities collected in *Xenos v. Wickham*, 13 C. B. N. S. 381 (E. C. L. R. vol. 106), in error 14 C. B. N. S. 435 (E. C. L. R. vol. 108). An alteration, to avoid a contract, must be in a material part of it. In *Croockewit v. Fletcher*, 1 Hurlst. & N. 893, where a charter-party had been entered into with a warranty that the ship, then at Amsterdam, should sail from thence for Liverpool on or before the 15th of March next, and, after the signing of it, the broker (Hearn) who had acted for the plaintiff, the shipowner, wrote in the margin, to come in after the words "March next," the words "wind and weather permitting,"—the alteration was held to avoid the charter-party, because a material one. In delivering the judgment of the court, Martin, B., there says: "It is, no doubt, apparently a hardship, that, where what was the original charter-party is perfectly clear and indisputable, and where the alteration or addition was made without any fraudulent intention, and by a person not a party to the contract, that a perfectly innocent man should thereby be deprived of a beneficial contract: but, on the other hand, it must be borne in mind, that, to permit any tampering with written documents, would strike at the root of all property, and that it is of the most essential importance to the public interest that no alteration whatever should

be made in written contracts; but that they should continue to be and remain in exactly the same state and condition as when signed and executed, without addition, alteration, rasure, or obliteration: but, upon this point, the case of *Davidson v. Cooper*, 11 M. & W. 778, is conclusive. No case can possibly be entitled to more weight than this. Lord Abinger, in giving judgment, stated that the court had arrived at their judgment after much reflection; and Lord Denman, in delivering the judgment of the court of error,—13 M. & W. 343,—stated that the court had arrived at their conclusion after much doubt; and the judgment is, that a party having the custody of an instrument for his own benefit, is bound to preserve it in its original state. It was said that Mr. Hearn was a stranger to the plaintiff: he certainly was not, for he was the agent of the plaintiff to deliver the charter-party to the defendant: but, even if he were, the rule in *Pigott's Case*, 11 Co. Rep. 27 a, is, 'that, when any deed is altered in a *part material* by the plaintiff himself, or by any stranger without the privity of the obligee, be it by interlineation, addition, erasing, or by drawing of a pen through a line or through the midst of a *material word*, the deed thereby becomes void:' and Lord Denman in his judgment stated that *Pigott's Case* had never been overruled, but, on the contrary, extended to unsealed documents; and, as we think that the stipulation as to *777] sailing on the 15th of March *was a condition precedent, the addition to it of 'wind and weather permitting' was a *material alteration*, and, we think, avoids the instrument." [BYLES, J.—Here, the alteration was assented to both by the plaintiff and the principal debtor.] Yes.

E. James, Q. C., and Baylis, in support of the rule.—The defendants never guaranteed the payment of any extras at all, but only that of the sum originally agreed upon. The plaintiffs contracted to do the whole of the work specified for 3800*l.*: and it was stipulated that any work not mentioned in that tender that might be required to be done by *the owners* should be paid for by *them* in addition to the amount specified. The substitution of the words "the owners" in the subsequent parts of the contract or tender, for "your" at the commencement, shows plainly who the plaintiffs meant to look to for the extras. Then, the insertion of the word "important" after the contract was signed, was a material alteration made by a party interested, and therefore rendered the contract void, at all events as against the sureties.

ERLE, C. J.—I am of opinion that this rule should be discharged. The action is brought upon a guarantee signed by the defendants, whereby they guaranteed the payment by H. M. Lawrence according to the contract, for the wood-work of an iron ship which H. M. Lawrence was building for Messrs. Moore & Co. The contract between H. M. Lawrence and the plaintiffs was made under these circumstances:—H. M. Lawrence was building an iron ship for Messrs. Moore & Co., and applied to the plaintiffs to do the wood-work. The plaintiffs refused to undertake the work without having security. H. M. Lawrence thereupon went to the defendants with the tender, and *778] asked *them to consent to give a guarantee. They did so; and the plaintiffs thereupon did the work, the contract-price for which, 3800*l.*, has been duly paid. Beyond the things specified in

the tender, the plaintiffs did other work upon the ship; and the question is, whether that extra work so done by the plaintiffs beyond what was specified in the contract is within the guarantee, which is in these words,—“In consideration of your contracting with Messrs. H. M. Lawrence & Co. for the wood-work of an iron ship now building by them for Messrs. Moore & Co., we hereby guarantee the payment to you according to the contract.” In H. M. Lawrence’s contract with the plaintiffs, there is a clause which provides that “any important work not mentioned therein that may be required to be done by the owners, shall be paid for by them, in addition to the amount (3800*l.*) thereafter specified.” As I read that contract, H. M. Lawrence is called throughout “the owners,” and not improperly so, for, until completed, the ship would be the property of the builder. In the course of the performance of their contract, the plaintiffs did some extra work at the request of H. M. Lawrence: and the question is whether the guarantee extends to that. I am of opinion that the additional work clearly is guaranteed by the defendants’ letter of the 8th of September, 1862, and therefore that the plaintiffs are entitled to recover.

The rest of the court concurring,

Rule discharged.

The defendants appealed against this decision, and the case was argued in the Exchequer Chamber on the 16th of May, 1865, before Pollock, C. B., Channell, *B., Blackburn, J., Mellor, J., Pigott, B., and Shee, J., and on the 19th of June, before Pollock, C. B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., Pigott, B., and Shee, J. [*779

E. James, Q. C. (with whom was *Baylis*), for the plaintiffs in error, contended that the defendants’ liability under the guarantee only extended to the wood-work mentioned therein, and did not extend beyond the tender or contract-price of 3800*l.* which had been paid, and this claim for extra work formed no part of the amount guaranteed by the defendants; and that the object of the clause as to extra work not mentioned in the tender or contract was not to expand the guarantee of the defendants, but to make it clear that it was to be the subject of an extra charge, which was to be paid for by the owners, or those who should order or require it to be done.

Brett, Q. C. (with whom was *C. Hutton*), insisted that the contract referred to in the guarantee clearly contemplated the possibility of extra work being required, and that, if such extra work was done, and was not paid for by the defendants’ brother (the party guaranteed), the defendants were to be liable upon their guarantee for the price of such extra work, as well as for the main sum of 3800*l.*: and that the insertion of the word “important” in the contract was not an alteration which discharged the defendants from liability, the insertion of that word having been made by the brother of the defendants, on their behalf, at the same time at which the contract was signed and finally agreed to by the plaintiffs and the guarantee delivered, and the insertion of that word having no material effect upon the liability of the defendants under the guarantee; and, consequently, *that the judgment of the Court of Common Pleas was right, and ought to be affirmed. [*780

THE COURT unanimously concurred in the view taken by the court below, and the judgment was accordingly affirmed.

Judgment affirmed.

HENRY KEMP RICHARDSON, Clerk, and THE HON. ANNE RICHARDSON, his Wife, v. EDWARD POWER and CATHERINE GOODALL POWER, his Wife, MARY MANTLE, Widow, THOMAS WATSON, WILLIAM WARTNABY and HARRIETT, his Wife, JOHN HENRY HOLDITCH, and WILLIAM LUCK. *July 10.*

A testator by his will devised certain real estates to his daughter Harriett for life, and after her death to her sons successively in tail, and, in default of such issue, to his son John Arthur in fee. By a codicil, the testator, after reciting that "he had by his will devised the reversion in fee in several estates, expectant on the decease of his several daughters (including Harriett), to his son John Arthur," and that "he had devised other estates to trustees to the use of his said son until he should attain the age of twenty-five years, and thereupon to him and his assigns for ever," declared his will to be, "that, in case his said son should happen to depart this life without leaving lawful issue of his body living at his decease, and before the said several estates should become vested in him by virtue of the said several limitations aforesaid," the said estates should go to such of his daughters as should then be living, and to the issue of such of them as should then be dead, in the manner therein mentioned.

The testator died in 1804: John Arthur attained twenty-five, and died in 1844, without having had issue: and the testator's daughter Harriett died unmarried in 1864:—

Held, that "vested," in the codicil, meant "vested in interest," and consequently that, on the death of the testator, the estates vested immediately in the son John Arthur, subject to the estates limited to the daughter Harriett and her issue, and that the devisees of John Arthur took.

THIS was an action of ejectment brought by the plaintiffs against the defendants to recover possession of one undivided moiety or half part, the whole into equal moieties to be divided, of and in certain closes or grounds enclosed, meadows, lands, and premises, with their appurtenances, situate, lying, and being in the lordship or liberties *781] of Lilbourne, in the county of *Northampton, called by the several names of Perkin's Meadow, Upper Turner's Close, Lower Turner's Close, and Mead Lands, otherwise Bottom Close, and Meadow, the whole containing 155a. 3r. 22p., more or less.

By consent and by a judge's order the following case was stated for the opinion of the Court of Common Pleas:—

1. Richard Arnold, of Lutterworth, in the county of Leicester, Esq., deceased, duly made and published his last will and testament in writing, bearing date the 28th of January, 1801, and executed and attested as by law was then required for passing freehold estates by devise: and thereby,—after devising certain hereditaments (subject to an annuity therein mentioned) in trust for his daughter Mary Arnold during her life, with remainder to the use of her first and other sons successively in tail, with remainder to the use of her daughters as tenants in common, with remainder to his son John Arthur Arnold, his heirs and assigns for ever; and devising certain other hereditaments (subject to a like annuity) in trust for his daughter Elizabeth Watson during her life, with remainder to the use of her first and other sons successively in tail, with remainder to the use of her daughters as tenants in common, with remainder to his said son

John Arthur Arnold, his heirs and assigns for ever; and devising certain other hereditaments (subject to a like annuity), in trust to receive the rents, issues, and profits thereof until his daughter Dorothy Arnold should attain the age of twenty-one years or marry, upon the trusts therein mentioned, and, after she should attain that age or marry, in trust for his daughter Dorothy Arnold during her life, with remainder to the use of her first and other sons successively in tail, with remainder to the use of her daughters as tenants in common, with remainder to his said son John Arthur *Arnold, his heirs and assigns for ever,—gave and devised as follows, that is to [*782 say, “I give and devise all those my several closes or grounds enclosed, meadow lands, hereditaments, and premises, with their appurtenances, situate, lying, and being in the lordship or liberties of Lilbourne aforesaid, called by the several names and containing the several quantities of land hereinafter mentioned, that is to say, Perkin’s Meadow 11a. 2r. 18p., Upper Turner’s Close 54a. 1r. 11p., Lower Turner’s Close 47a. 0r. 8p., and Mead Lands 42a. 3r. 15p., or thereabouts, be the same respectively more or less, now in the tenure or occupation of Richard Reeve, his assignee or assigns (subject, nevertheless, to the payment of the sum of 20l. per annum already charged upon the said premises and payable to Miss Alice Lovett, daughter of Mr. William Lovett, deceased, for her life), unto my said wife and the said Richard Arnold and John Adcock, and their heirs, Upon trust that they my said wife and the said Richard Arnold and John Adcock, and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall receive and take the rents, issues, and profits thereof, and the sum of 20l. per annum, part thereof, pay to or retain in the hands of her my said wife half-yearly, by equal portions, for and during the term of her natural life, and the residue of the said rents, issues, and profits do and shall receive and take during and until my daughters Anna Maria and Harriett shall severally and respectively attain the age of twenty-one years or be married, upon the trusts hereinafter mentioned; and, from and immediately after my said two last-mentioned daughters shall have severally attained the said age of twenty-one years, or be married, then upon trust that they my said wife and the said Richard Arnold and John Adcock, or the survivors or survivor of them, or *the executors or [*783 administrators of such survivor, do and shall receive and take one moiety or full half part of the rents, issues, and profits of the said last-mentioned hereditaments and real estate, and every part thereof, for and during the then remainder of the term of the natural life of my said daughter Anna Maria, and during that time pay, apply, and dispose of the same to and for her sole and peculiar use and benefit; and, from and after the decease of my said daughter Anna Maria, I give and devise one undivided moiety or full half part of my said last-mentioned closes or grounds enclosed, meadows, lands, hereditaments, and premises, with their appurtenances, to the use of the first son of the body of my said daughter Anna Maria lawfully to be begotten, and to the heirs of the body of such first son lawfully issuing; and, in default of such issue, to the use of the second, third, fourth, and all and every other the son and sons of the body of my said daughter Anna Maria lawfully to be begotten, severally, successively, and in

remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and to the several and respective heirs of the body and respective bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs of his body issuing to be always preferred and to take before a younger of such sons and the heirs of his body issuing; and, in default of such issue, to the use of all and every the daughter and daughters of the body of my said daughter Anna Maria, lawfully to be begotten, as tenants in common, and not as joint-tenants; and, in default of such issue, I give and devise my said last-mentioned moiety of the said closes or grounds enclosed, meadows, lands, hereditaments, and premises, with their appurtenances, unto my said son John Arthur Arnold, *784] his heirs and assigns for ever. And, as to the other *undivided moiety or full half part of the said last-mentioned closes or grounds enclosed, meadows, lands, hereditaments, and premises, with their appurtenances, from and after my said daughter Harriett shall attain the said age of twenty-one years or be married, upon trust that they my said wife and the said Richard Arnold and John Adcock, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall receive and take the rents, issues, and profits of the said last-mentioned moiety for and during the then remainder of the term of the natural life of my said daughter Harriett, and during that time pay, apply, and dispose of the same to and for her sole and peculiar use and benefit; and, from and after the decease of my said daughter Harriett, I give and devise the said undivided moiety or full half part of my said last-mentioned closes or grounds enclosed, meadows, lands, hereditaments, and premises, with their appurtenances, to the use of the first son of the body of my said daughter Harriett lawfully to be begotten, and to the heirs of the body of such first son lawfully issuing; and, in default of such issue, to the use of the second, third, fourth, and all and every other the son and sons of the body of my said daughter Harriett lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs of the body and respective bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs of his body issuing to be always preferred and to take before a younger of such sons and the heirs of his body issuing; and, in default of such issue, to the use of all and every the daughter and daughters of the body of my said daughter Harriett *785] lawfully to be begotten, as tenants in common, and not as *joint-tenants: and, in default of such issue, I give and devise my said last-mentioned moiety of the said closes or grounds enclosed, meadows, lands, and premises, with their appurtenances, unto my said son John Arthur Arnold, his heirs and assigns, for ever."

The testator then directed that the rents of the estates thereinbefore devised for the benefit of his daughters Mary, Dorothy, Anna Maria, and Harriett respectively, should be paid to them for their sole and separate use, as therein more particularly mentioned: and he directed his trustees, during the respective minorities of his daughters Dorothy, Anna Maria, and Harriett, to maintain and educate them out of the rents of the estates devised to them respectively, and, upon

their respectively attaining the age of twenty-one years, or marrying with such consent as therein mentioned, to stand possessed of the unapplied surplus of such rents and profits to and for the use and benefit of his said son John Arthur Arnold in such and the same manner as the net proceeds of the testator's personal estate were thereafter directed to be applied and disposed of for his benefit.

And the said testator then devised certain other hereditaments unto his wife until his said son John Arthur Arnold should attain the age of twenty-five years; and, from and immediately after his said son should have attained the said age, he gave and devised the same unto his said son John Arthur Arnold, his heirs and assigns, for ever: but, in case the testator's said son should happen to depart this life under the said age of twenty-five years and without issue, then the testator gave and devised the same hereditaments to his the testator's said wife and her assigns for her life, and, from and after her decease, to his the testator's five daughters, Mary, Elizabeth, Dorothy, Anna Maria, and Harriett, their heirs and assigns for ever, as tenants in common.

*And the testator then gave and devised the residue of his real estate (except two closes therein mentioned) unto trustees [*786 for the term of 500 years, upon certain trusts therein mentioned for securing the payment of three life-annuities to the persons therein mentioned: and, from and after the expiration or sooner determination of the said term, and in the mean time subject thereto, upon trust that they his said trustees or the survivors or survivor of them, or the executors or administrators of such survivor, should receive the rents, issues, and profits thereof until the said John Arthur Arnold should attain the age of twenty-five years, and the same pay, apply, and dispose of in his maintenance, education, and bringing-up, in such manner as they should think proper, during his minority; and, from and immediately upon his attaining the said age of twenty-five years, upon trust to account with and pay the said rents and profits to the said John Arthur Arnold, to and for his own use and benefit: And also, immediately upon the said John Arthur Arnold's attaining the age of twenty-five years, the said testator gave and devised the last-mentioned hereditaments to him the said John Arthur Arnold, his heirs and assigns for ever. And the testator devised the two closes which he had excepted from the residuary devise of his real estate, to trustees during the minority of his said son John Arthur Arnold, upon trust to apply the rents for his benefit as therein mentioned; and, from his attaining the age of twenty-one years, the testator devised the same closes to the said John Arthur Arnold for his life, with a limitation to trustees to preserve contingent remainders; and, after his death, to the use of the first and other sons of the said John Arthur Arnold, successively, in tail, with remainder to the use of his daughters as tenants in common, with remainder to the testator's said five daughters as tenants in *common in fee. And [*787 the testator, after giving certain legacies and annuities, bequeathed the residue of his personal estate to his said trustees, upon trust to invest the same in manner therein mentioned, and to apply the income thereof for the benefit of the said John Arthur Arnold until he should attain the age of twenty-one years; and, from and

immediately after he should attain that age, to pay the same to him for his own use and benefit, to whom the testator thereby gave the same.

That moiety which was given in trust for the testator's daughter Harriett for her life of and in the said closes, enclosed meadows, lands, and premises called respectively Perkin's Meadow, Upper Turner's Close, Lower Turner's Close, and Mead Lands, with their appurtenances, is the said moiety to which the present action relates.

3. The said Richard Arnold duly made and published a codicil, dated the 11th of June, 1803, to his said will, which codicil was duly executed and attested in manner then required for passing freehold estates by devise; and he thereby recited and revoked the devise in his said will contained for the benefit and in favour of his said daughter Elizabeth Watson, for her life, with remainder to her children, as hereinbefore mentioned; and he devised part of the hereditaments comprised in the said revoked devise to certain uses and upon certain trusts for the benefit of the said Elizabeth Watson and her children as therein mentioned, subject to such annuity as therein mentioned: and he devised the residue of the same hereditaments to trustees, upon trust to receive the rents and profits thereof until his said son John Arthur Arnold should attain his age of twenty-five years, and pay thereout an annuity of 20*l.* to the testator's wife during her life, and apply the residue thereof for the benefit of the said John

*788] Arthur Arnold as therein mentioned; and, when and so soon as the said John Arthur Arnold should have attained that age, then upon trust to account with and pay the said rents and profits to him; and, from and immediately after the said John Arthur Arnold should have attained that age, the testator devised the same hereditaments unto the said John Arthur Arnold, his heirs and assigns for ever, subject to the payment of the said annuity of 20*l.* to the testator's wife during her life: And the testator bequeathed to trustees a sum of 1500*l.* upon the trusts therein mentioned for the said Elizabeth Watson and her children; but, in case there should be no children of the said Elizabeth Watson living at her decease, or, being such, all of them should happen to depart this life under the age of twenty-one years without leaving lawful issue, then in trust to pay the same trust premises to the said John Arthur Arnold; and, in case the said John Arthur Arnold should be then dead, leaving lawful issue then living, then the testator gave the same trust moneys to be equally divided amongst his said other four daughters, Mary, Dorothy, Anna Maria, and Harriett, share and share alike. And the said Richard Arnold then by the now-stating codicil recited and devised in the words following, that is to say,—

"Whereas, I have in and by my said will given and devised the reversion in fee of and in divers lands, tenements, and hereditaments, expectant on the several deceases of my said daughters, Mary, Dorothy, Anna Maria, and Harriett, without issue of their respective bodies, unto my said son John Arthur Arnold, his heirs and assigns for ever: And whereas I have also in and by my said will, as well as by this my codicil, limited divers other lands, tenements, and hereditaments (subject to certain annuities or rent-charges therein specified) for the use and benefit of my said son John Arthur Arnold, his heirs

and assigns, until *he attains his age of twenty-five years; and upon his attaining the said age of twenty-five years, then I [*789 have given and devised the same to him my said son, his heirs and assigns, for ever: Now, I do hereby declare my will to be, that, in case my said son shall happen to depart this life without leaving lawful issue of his body living at his decease, and before the said several estates shall become vested in him by virtue of the several limitations aforesaid, then and in such case I give and devise the said estates, chargeable as by my said will and this my codicil is before mentioned, unto such of my several daughters Mary, Elizabeth, Dorothy, Anna Maria, and Harriett, as shall be then living, and the issue of such of them as shall be then dead, in manner following, that is to say, I give and devise an equal undivided share thereof to every one of them my said daughters Mary, Dorothy, Anna Maria, and Harriett, as shall be then living, and to their respective heirs and assigns, as tenants in common, and not as joint-tenants; and, in case of the death of either of them my said daughters Mary, Dorothy, Anna Maria, and Harriett, before my said son, leaving issue then living, then I give the share and shares of her and them so dying unto the heirs of the body of such daughter and daughters respectively: And, as to the share of my said daughter Elizabeth Watson, I give and devise the same unto my said wife Elizabeth Arnold and the said Richard Arnold and John Adcock, and their heirs, during the life of the said Richard Watson, in trust to apply and dispose of the rents and rent and profits thereof from time to time as the same shall become due, in the purchase of stock in the Government funds, in order thereby and by the produce from time to time of such purchased stock to form an accumulated fund during the said Richard Watson's life, and, from and after his decease, upon trust to pay all such original and accumulated stock and moneys unto my daughter *Elizabeth for her own use; but, in the case [*790 of the decease of my said daughter Elizabeth in the meantime, leaving issue then living, then in trust to pay all such stock and moneys to such issue in equal shares and proportions; and, in case my said daughter Elizabeth shall happen to die in the lifetime of the said Richard Watson, without leaving any issue then living, then in trust to pay all such stock and moneys to my said four other before-named daughters, in equal shares and proportions: and, from and after the decease of the said Richard Watson, I give and devise the said undivided part or share of my said daughter Elizabeth of and in the said estates, unto her my said daughter Elizabeth for her life; and, from and after her decease, I give and devise the same unto and amongst all her children that shall be then living, and their respective heirs, share and share alike, as tenants in common, and not as joint-tenants: And, in case my said daughter Elizabeth shall depart this life in the lifetime of my said son, leaving issue of her body then living, then I give and devise the share of my said daughter Elizabeth in the said estates to the heirs of her body."

And,—after reciting that he had by his will given to his daughters Mary, Dorothy, Anna Maria, and Harriett, the several sums of 2000*l.* apiece upon their attaining their respective ages of twenty-one years or days of marriage, and in case they should any of them die under that age and unmarried he had given the shares of such of them so.

dying unto his said son, and that he had also given the residue of his personal estate, together with the produce of the accumulated trust rents of his several real estates, unto his said son John Arthur Arnold, to his own use, upon his attaining the age of twenty-one years,—the testator by the now-stating codicil declared, that, in case his said son John Arthur Arnold should happen to depart this life before *791] he attained that age, and without leaving *lawful issue of his body then living, then the testator gave one equal part or share of all the said accumulated trust rents, moneys arising by the death of any of his said daughters, and personal estate, unto such of his said daughters Mary, Elizabeth, Dorothy, Anna Maria, and Harriett, as should happen to survive his said son; but, as to the share of the said Elizabeth Watson, subject to such provisions as in the now stating codicil contained.

4. The said testator was at the time of making his said will, and thenceforth until and at the time of his death, seised and well entitled, to him and his heirs, of and to the said closes or grounds enclosed, meadows, lands, hereditaments, and premises so devised by him as aforesaid.

5. The said testator died in the year 1804, without having revoked or varied his said will, save so far as the same was varied by the said codicil, and without having revoked or varied the said codicil.

6. The testator left him surviving his widow, Elizabeth Arnold, and six children, viz. the said John Arthur Arnold, his only son and heir-at-law, and Mary Arnold, Elizabeth, then the wife of Richard Watson, Dorothy Arnold, Anna Maria Arnold, and Harriett Arnold, in his said will respectively named. The said John Arthur Arnold was the testator's youngest child.

7. The said John Arthur Arnold duly made and published his last will and testament in writing, dated the 19th of February, 1842, and thereby devised as follows:—"I give and devise all the messuages, lands, tenements, tithes, and other hereditaments, and part or share, parts or shares of messuages, lands, tenements, tithes, and other hereditaments at or within the parish of Lilbourne, in the county of Northampton, of or to which I am or may become seised or entitled *792] *under the will and codicil of my late father Richard Arnold, deceased, or one of them, or otherwise, upon the respective deceases of my sisters Dorothy and Harriett Arnold respectively, and such failure of issue of their respective bodies as in the same will and codicil or one of them is mentioned, unto and to the use of the said Thomas Watson, his heirs and assigns for ever." And, on the 26th of October, 1843, the said John Arthur Arnold duly made and published a codicil to his said will, and thereby, after fully reciting the hereinbefore-stated devise contained in his said will, and after reciting that the said Dorothy Arnold was then dead without having been married, but that the said Harriett Arnold was still living, the said testator proceeded as follows, that is to say,—“I do hereby revoke so much of my said will as relates to the devise hereinbefore mentioned of the hereditaments at Lilbourne aforesaid to which I might become entitled upon the respective deceases of my sisters Dorothy Arnold and Harriett Arnold and such failure of their issue respectively as above referred to:” and, after devising as therein mentioned the

hereditaments to which he had become entitled in possession upon the death of his said sister Dorothy Arnold, the said testator devised in the words following, that is to say,—“And, as to so much of the same hereditaments at Lilbourne aforesaid as I am so entitled to as aforesaid in expectancy upon the death of my said sister Harriett Arnold without such issue as above referred to, I give and devise the same, with the appurtenances, unto and to the use of my said wife” (meaning thereby the plaintiff Anne Richardson), “her heirs and assigns for ever.”

8. On the 12th of May, 1844, the said John Arthur Arnold died, without having revoked or altered his said will, except so far as it was altered by the said *codicil, and without having revoked [*793 or altered his said codicil.

9. The said John Arthur Arnold left Anne Arnold, his wife, him surviving, who has since married the Rev. Henry Kemp Richardson; she and her present husband being the plaintiffs in this action.

10. The said John Arthur Arnold never had any issue. There were living at his decease three of his said sisters, viz. Mary, Anna Maria, and Harriett: his sister Elizabeth Watson had died previously, leaving the defendant Thomas Watson and several other children her surviving.

11. The said Anna Maria Arnold attained the age of twenty-one years, and afterwards married George Wartnaby, who died in her lifetime; and the said Anna Maria Wartnaby died in August, 1863, leaving one child only her surviving, viz. the defendant Harriet Wartnaby. The said Harriett Arnold attained her age of twenty-one years; and on the 22d of January, 1864, she died, a spinster, having made a will and thereby devised all her real estate to the defendant John Henry Holditch, his heirs and assigns, in trust to sell the same.

12. The wills and codicils of the said Richard and John Arthur Arnold were to be read and taken as part of the case.

The question for the opinion of the court was, whether or not, under the circumstances hereinbefore stated, the plaintiffs are now entitled to the possession of that moiety of and in the said lands at Lilbourne of which the said Harriett Arnold was tenant for life under the said will of the said Richard Arnold.

If the court should be of opinion that the plaintiffs were so entitled as aforesaid, then judgment was to be entered up for the plaintiffs, to recover possession of the said moiety of the said lands, with costs. If the *court should be of opinion that the plaintiffs were not so entitled as aforesaid, then judgment was to be entered up [*794 for the defendants, with costs.

No argument took place in the Court of Common Pleas, it being agreed that judgment should pass for the plaintiff, upon the authority of the decision of the Master of the Rolls upon the same will in the case of *Re Richard Arnold's Estate*, 33 Beavan 163, where it was held that the daughters took for life only; that the devise for life contained in the will could not be enlarged by a recital in the codicil that the devise was in tail; and that the word “vested,” in the gift over, meant vested in interest, and not vested in possession.

A writ of error was thereupon brought, and the case was argued

in the Exchequer Chamber at the sittings after Easter Term last, before Pollock, C. B., Channell, B., Blackburn, J., Mellor, J., Pigott, B., and Shee, J.

Cadman Jones, for the plaintiffs in error (the defendants below), contended that the expression in the will of Richard Arnold, "in case my son shall die before the estates become vested in him," whatever be the *prima facie* legal interpretation of the word "vested," evidently meant here a vesting in *possession*, as contra-distinguished from a mere vesting in *estate*: and he referred to the following authorities,—*Berkeley v. Swinburne*, 16 Simons 275, 17 Law J., Chan. 416; *Taylor v. Frobisher*, 5 De Gex & Sm. 191, 21 Law J., Chan. 608; *Poole v. Bott*, 11 Hare 33, 22 Law J., Chan. 1042; *Boraston's Case*, 3 Co. Rep. 19; *Young v. Robertson*, 4 Macqueen 314; *Re Gregson's Trusts*, 34 *795] *Law J., Chan. 41; *Wordsworth v. Wood*, 1 House of Lords Cases 129.

Sir Roundell Palmer, A. G. (with whom was *Pearson*), for the defendants in error (the plaintiffs below), submitted, that, according to all the legitimate rules of construction, the decision of the Master of the Rolls in the case of *Re Arnold*, 33 Beavan 163, upon this will, was correct; that, in construing a will, the natural and ordinary meaning must be given to the language of the testator, unless such a construction would be manifestly repugnant or inconsistent or incongruous; that technical words in a will must always be interpreted in their known technical sense, unless it be manifest from the whole scope of the instrument that the testator's intention was otherwise; that the gift in the will to John Arthur could only be defeated by clear and unambiguous language in the codicil; that the reversion *vested* in John Arthur immediately on the death of his father; and that that estate was not defeated or destroyed by anything contained in the codicil. The following cases were cited,—*Gray v. Pearson*, 6 House of Lords Cases 61; *Roddy v. Fitzgerald*, 6 House of Lords Cases 823; *Egerton v. Brownlow*, 4 House of Lords Cases 208, 23 Law J., Chan. 348; *Doe d. Hearle v. Hicks*, 8 Bingh. 475 (E. C. L. R. vol. 21), 1 M. & Scott 759 (E. C. L. R. vol. 28), 1 Clark & Fin. 20; *Comport v. Austen*, 12 Simons 218; *Russel v. Buchanan*, 7 Simons 628; *Re Thruston's Trusts*, 17 Simons 21; *Griffith v. Blunt*, 4 Beavan 248; *Blakemore's Case*, 20 Beavan 214; *Re Morse's Settlement*, 21 Beavan 174, 25 Law J., Chan. 192; *Re Thatcher's Trusts*, 26 Beavan 365; *Rowland v. Tawney*, 26 Beavan 67; *Sheffield v. Kennett*, 27 Beavan 207; *In re Cant's Estate*, 4 De Gex & J. 503, 28 Law J., Chan. 641; *King v. Cullen*, 2 De Gex & Sm. 252; *Parkin v. Hodgkinson*, *796] 15 Simons 293; *The *Commissioners of Charitable Donations v. Cotter*, 2 Drury & W. 615; *Henderson v. Kennicot*, 2 De Gex & Sm. 492, 18 Law J., Chan. 40.

Cadman Jones was heard in reply.

Cur. adv. vult.

CHANNELL, B., now delivered the judgment of the court: (a)—

This was an action of ejectment brought to recover the possession of a moiety of certain lands at Lilbourne, in the county of Northampton, of which one Harriett Arnold was tenant-for-life under the will of Richard Arnold.

(a) The learned Baron intimated that Pigott, B., who had only heard a part of the argument, declined on that account to take any part in the judgment.

The question in the cause arises on the will and codicil of Richard Arnold. This will and codicil were in the year 1863 the subject of proceedings before the Master of the Rolls, with reference to another devise in similar terms to that now to be considered.

In the present action of ejectment a case was stated for the opinion of the Court of Common Pleas, pursuant to the Common Law Procedure Act: and the question submitted to that court was assumed to be in principle the same as the one which had been before the Master of the Rolls *in re Arnold's Estate*. The Court of Common Pleas ordered judgment in the ejectment to be entered for the plaintiffs below, in accordance with the judgment pronounced by the Master of the Rolls, to enable the defendants below to proceed in error upon the judgment so ordered to be entered.

Proceedings in error having been taken, and brought before us, we are now called upon to consider the formal decision of the Court of Common Pleas.

In 1801, Richard Arnold made a will, by which he devised the property which is the subject of this *ejectment, to trustees [*797 from and after his daughter Harriett should attain twenty-one, or marry, upon trust to pay her the rents and profits for her separate use during her life; and, after her death, he devised it to the use of the first and other sons of Harriett in tail, and, in default of such issue, to the use of the daughters of Harriett, as tenants in common; and, in default of such issue, the testator gave and devised the estate in question to his son, John Arthur Arnold, in fee. Then, by the codicil, the testator recites that he had by his will devised the reversion in fee in several estates expectant on the decease of his several daughters, including Harriett, to his son John Arthur Arnold, and also that he had devised other estates to trustees, to the use of his said son John Arthur Arnold, his heirs and assigns, until he attained twenty-five, and thereupon, to him, his heirs and assigns, for ever: and then the testator proceeds to declare his will to be, that, in case his said son should die without leaving lawful issue of his body living at his decease, and before the said several estates should become vested in him by virtue of the said several limitations aforesaid, then the testator gave and devised them to such of his daughters as should be then living, and the issue of such of them as should be then dead, in the manner therein mentioned.

The testator died in 1804. The son John Arthur Arnold attained twenty-five after the testator's death, and died without issue, in 1844. Harriett attained twenty-one after the testator's death, and died unmarried, in 1864.

The question for our consideration is, whether the estates in question devised to Harriett had at the death of John Arthur Arnold become vested in him or not: and it may be taken generally, without more particularly referring to the will of John Arthur Arnold, or *to the state of the family, as set out in the special case, that, [*798 if the estates had so vested, the judgment of the Court of Common Pleas must be affirmed: but, if they had not vested, then the judgment must be reversed.

Now, by the devise in the will, particular estates, viz., life-estates and estates-tail, are given to Harriett Arnold and her issue, with an

ultimate remainder in fee to John Arthur Arnold, a living person. This remainder in fee devised by the will, is, we think, an estate which vested at the death of the testator.

We have then to see whether there is anything in the codicil which shows an intention that it shall not so vest.

In the course of the argument before us, very many authorities were cited; some of which we do not think it necessary particularly to advert to.

It was scarcely disputed, if at all, that, if the words in the codicil, "in case his said son should die before the said several estates should become vested in him by virtue of the said several limitations aforesaid," were to be construed in their strict technical sense, that then the contest on the part of the plaintiffs below was correct. But it was argued on the part of the plaintiffs in error that the words in the codicil we have referred to were to be understood, not in their strict technical, but in their ordinary and popular sense, and, so construed, would maintain the view of the plaintiffs in error. In support of this view, we were pressed with the case of *Young v. Robertson*, 4 Macq. 814, as an authority directly in point. That case was decided early in the year 1862, was probably not reported at the time of the decision by the Master of the Rolls in *re Arnold's Estate*, certainly was not cited in the last-mentioned case.

In *Young v. Robertson*, words somewhat similar to those in the present codicil were held to show an intention that the property should
*799] vest not à morte *testatoris, but at the death of the tenant for life. Now, in the first place, it is to be observed, that, in that case, the words upon which the decision proceeded were all in the same instrument, viz., a Scotch trust-disposition; for, the principle of the decision was not at all affected by the codicil, which only introduced another grand-nephew of the testator or trustor to share in the trust-disposition first made.

In the present case, the devise in the will, under the circumstances which have arisen, is, we think, clear; and the question is, whether the words of the codicil alter the ordinary period of the vesting of the interest under that devise. It has been decided that a gift in a will can only be destroyed by something equally clear in a codicil: see *Doe d. Hearle v. Hicks*, 1 Clark & Fin. 20, acted on recently by the Court of Exchequer in *Robertson v. Powell*, 2 Hurlst. & Colt. 762. So that we cannot say that the period of vesting here is deferred, unless we see from the words of this codicil an intention that the property shall not vest until the death of Harriett, as clearly as we do see from the words of the will an intention to give an estate in remainder, to vest at once.

It will be well to examine the reasons upon which *Young v. Robertson* was decided, with a view of seeing how far any of them are applicable to the present case. The decision proceeds mainly upon two grounds,—first, that, where words of survivorship occur in an instrument in which a period for payment or distribution is named, that period is the time to which the surviving is to be referred,—and, secondly, that, where a testator, in a will, which is considered to speak from the time of his death, uses the words "before the share or estate becomes vested," he must *primâ facie* be taken to mean something

more than "before my death." Now, the first of these reasons cannot in our opinion apply in this case; for, there is no period *of [*800 payment or distribution named distinctly in the clause here in question. The gift over is to such of the daughters *then* living. If, on looking back into the sentence, we found that the word "then" referred grammatically to the period of payment or of obtaining possession of the estate, the reasoning of *Young v. Robertson* would apply: but we find, on looking back for a period of time to which to refer the word "then," that it appears to be the death of John Arthur Arnold before the estates have vested in him; so that we are still left in uncertainty as to when that vesting is to take place, and cannot determine it by the rule suggested. Then, as to the second reason, that also does not so clearly apply here, because the gift over in the codicil comprises not only the estates now in question devised to Harriett, as to which it may be conceded that the period of vesting is either the death of the testator or the death of Harriett, but also other estates which are so devised that it might be a question whether they would vest in John Arthur Arnold until he attained the age of twenty-one.

Probably, if we were called on to decide that question, we should say that they vested at the testator's death: see *Boraston's Case*, 3 Ca. Rep. 19 b, and subsequent decisions. Still it might be doubted, especially as to those estates devised by the codicil, though there could be no doubt if the devise were in the exact terms *recited* by the codicil. Therefore, although, for the purpose of making a gift over of the estates now in question, it would have been simpler to have said "before my death," instead of "before the estate vests," it would not be so at all, if the testator had intended the gift over to take effect as to some of the estates comprised in it on John Arthur Arnold's dying before himself, but, as to others, on his dying before twenty-five.

Probably the form of words used was the shortest *which [*801 could be used for that purpose: and, if so, the argument deduced from the supposed simplicity of the other expression loses its force, although, doubtless, if the testator had the meaning we have suggested, it would have been well that he should have expressed it more clearly. Besides, the intention of the testator in making the gift over at all, is no doubt to prevent the property being undisposed of by the will. That will take place only if the devisee dies before his interest vests. Then, if so, it is not at all unnatural that he should in terms make the gift over to take effect on the happening of the event he wishes to guard against, that is, the death of the devisee before the vesting of his interest, instead of in terms making it depend upon the death of the devisee before the actual event upon which the interest would vest and the gift over become unnecessary, although, in the particular instance, the latter might be a simpler expression. His object being to provide against a particular result, he would say, "I give this over to my daughters, if that result happens," rather than name the event which would cause the result: so that, in our opinion, the main reasons given for the decision of *Young v. Robertson* would not apply to this case.

It is said that that case has been acted upon by the Lords Justices in the case of *Gregson's Trusts*, 34 Law J. Ch. 4. That case shows,

no doubt, that there is no difference between real and personal estate, so as to prevent the application to real estate as well as to personal of the rule in *Young v. Robertson*, that words of survivorship should be referred to the period of distribution, where it appears from the collocation of the words that it was the intention of the testator to do so. In *Gregson's Trusts*, this intention was very clear,—“On the death of my wife, the estate shall be shared equally amongst the survivors of certain persons.” It would have been difficult there not *802] to read survivors as *meaning surviving at the death of the wife: yet many authorities were quoted in favour of the opposite construction: and the Lords Justices, in giving judgment, expressly said that there were authorities both ways. Hence, for the reasons we have mentioned, the intention is by no means so clear: and, being in a codicil, the words ought to be more clear before we could say that they divested the interest given by the will.

Notwithstanding the case of *Young v. Robertson*, we see no reason for construing the words in the codicil in the present case in any other than their usually received and recognised technical sense.

We are of opinion, that, according to the true construction of the will, the undivided moiety of the estates in question, on the death of the testator Richard Arnold, vested in his son John Arthur Arnold, in fee in remainder expectant on the determination of the particular estates devised to Harriett Arnold and her issue; and that, according to the true construction of the codicil, the executory devise over in the event of the said John Arnold dying without leaving issue, and before the estates became vested in him by virtue of the limitations in the will, was to take effect only in case the said John Arthur Arnold died without leaving issue before the said estates became vested in him in point of interest.

We further think that the said moiety did so vest in him in point of interest, and therefore that the said devise over of the said moiety never took effect. If so, the plaintiffs below are, under the circumstances stated in the case, entitled to recover that moiety.

We therefore affirm the judgment of the Court of Common Pleas given in accordance with that of the Master of the Rolls.

Judgment for the plaintiffs below.

The technical meaning of the term *interest*, although its sense may be to “vest” seems to be the same in the varied by the context to vest in *possession*: 28 Barb. 432; *Hawkins on son v. Lukens*, 11 Harris 31: vest in *Wills* 222.

ADDITIONAL CASES

FROM

CONTEMPORANEOUS REPORTS.

IN THE HOUSE OF LORDS. (a)

THE COMPANY OF FREE FISHERS AND DREDGERS OF WHITSTABLE v. GANN. 1865.

1. The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is by law vested in the Crown: but this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from or interfere with the right of navigation which belongs by law to all the subjects of the realm.

If, therefore, the Crown grants part of the bed or soil of a navigable river or an estuary, the grantee takes it subject to the public right, and cannot in respect of his ownership of the soil claim anything which interferes with the enjoyment of the public right.

2. Anterior to Magna Charta (by which such grants were prohibited), a several fishery in an arm of the sea or navigable river might have been granted by the Crown to a subject; and the grant might include a portion of the soil for the purpose of the fishery. But this, like every other grant, whenever made, must have been subject to the public right of navigation.

Where, therefore, the plaintiffs claimed to be entitled by Royal grant to a portion of the bed and soil (below low-water mark) of the arm of the sea which forms the estuary of the river Thames opposite to the manor of Whitstable, in the open sea-way, being the high road for the passage of vessels, and claimed, as an immemorial payment due to the lords of the manor, a sum of 1s. for every vessel which cast anchor within the precincts of that part of the bed or soil of the river within the manor which was claimed by them:—Held that, inasmuch as this claim interfered with the right to anchor, which is a necessary part of the right of navigation, subject to which the original grant must be taken to have been made,—it could not be supported on the ground of ownership of the soil.

3. If such payment be claimed as an ancient anchorage-due, some facts must be shown which prove, or from which it may be inferred, that the soil was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered to the public, in respect of which the alleged grant was made: but no such presumption can be made or inference drawn from the mere fact of an immemorial payment.

THIS was an action brought by the plaintiffs, a company incorporated by the 33 G. 3, c. 42 (local act), under the name of "The Company of Free Fishers and Dredgers of Whitstable, in the county of Kent," to try their right to receive a payment of 1s. for every vessel anchoring on certain land covered by the sea, the soil of which was claimed by the plaintiffs.

The declaration was in the indebitatus form for anchorage. The defendant pleaded never indebted.

The cause was tried before Erle, C. J., at the Maidstone Spring Assizes, 1861, when a verdict was found for the plaintiffs, leave being reserved to the defendant to move to enter the verdict for him if the court should be in his favour upon the points hereinafter mentioned,—both parties undertaking to be bound by the decision of the court thereon, unless the court should give leave to appeal, and to appeal on those points only on which the court should so give leave. The evidence given at the trial was in substance as follows:—

By deeds of lease and release, bearing date respectively the 11th and 12th of October, 1791, the fee-simple of the manor of Whitstable, &c., were conveyed to Edward Foad and James Smith, in equal moieties, as tenants in common in fee. The following is an extract from the conveying part of the deed of release:—"All that the manor of Whitstable, with all and singular the rights, royalties, privileges, members, and appurtenances thereof, in the said county of Kent; and also all courts-leet, courts-baron, perquisites and profits of courts to the same belonging or in any wise appertaining; and also all those quit-rents payable yearly to the said manor by several persons, formerly said to amount to the sum of 13*l.* 18*s.*, but now to the sum of 17*l.* 16*s.* per annum: And also all the fishery of Whitstable, being a royalty of fishery or oyster-dredging within the said manor, formerly computed to be of the yearly value of 23*l.* 4*s.*, but now of 76*l.* 15*s.* 2*d.* per annum, on an average for the last seven years; together with all and singular messuages, houses, outhouses, buildings, dovehouses, barns, stables, mills, tofts, yards, orchards, gardens, lands, tenements, meadows, leasowes, pastures, feedings, closes, enclosures, woods, underwoods, trees, rents and services of tenants and farmers, quit-rents, free-rents, rents of assize, ways, paths, passages, waters, streams, fishings, fishing places, watercourses, ponds, pools, moats, warrens, wastes, waste grounds, commons, common of pasture, furzes, heaths, moors, marshes, courts-leet, courts-baron, views of frankpledge, perquisites and profits of courts and leets, homages, fealties, reliefs, heriots, escheats, fines, issues, amerciements, goods and chattels of felons and fugitives and of persons attainted and of persons outlawed and put in exigent, deodands, waifs, estrays, treasure-trove, fines, forfeitures, mines, quarries, and all other royalties, franchises, liberties, rights, jurisdictions, privileges, immunities, profits, commodities, emoluments, advantages, and hereditaments whatever to the said manor, royalty, and fishery, hereditaments and premises hereby granted and released, or intended so to be, or any of them, belonging or in any wise appertaining, or therewith held, used, occupied, or enjoyed, or accepted, reputed, taken, or known as part, parcel, or member thereof, or to be had, received, perceived, or taken, used, exercised, or enjoyed in, upon, or out of or arising from the same manor or lordship, royalty, and fishery, hereditaments, and premises, or any of them, or any part or parcel thereof."

By deeds of lease and release, bearing date respectively the 24th and 25th of October, 1792, it was, amongst other things, recited and limited as follows: "And whereas, within the limits of the said manor of Whitstable there is, and for many hundred years now last past hath been, a fishery for the growth and improvement of oysters, extending from the sea-beach for a very considerable distance into the

sea, and which fishery during all that time hath been managed and carried on by and at the expense of a certain company of free dredgers called The Whitstable Company of Dredgers, who have held the same from time to time as tenants under the lord of the said manor, and claim to be entitled to hold the same as free fishers, on payment of such annual rents as are hereinafter mentioned: And whereas it hath been contracted and agreed by and between the said parties to these presents, that, for the several considerations hereinafter mentioned, a division shall be made in the rights of the said manor, royalty, fishery, hereditaments, and premises, and to that end that the said manor and all the lands, grounds, quit-rents, and manor rights belonging thereto (except as hereinafter is mentioned) shall be the property of the said Edward Foad, John Nutt, and Stephen Salisbury, their heirs and assigns, and that all the rights of the lord of the said manor in the said fishery, and the ground and soil thereof from the south and south-east sides of the sea-beach (which from time to time have been considered as the land boundaries of the said fishery), and in the customary payments usually made to the lord of the said manor for or on account of the anchorage of any ship or vessel, or for the landing of any goods or merchandise, or for the admission of freemen, or other payments for the regulation of the freemen or fishery, and all other payments whatsoever at the water-court of free dredgers there within the jurisdiction of the said manor, and other such like payments, and all forfeitures, articles, and things which of right belong to and are the property of the lord of the said manor by reason of any wrecks of the sea or such like rights and forfeitures arising within the limits of the said sea-beach, shall be the property of the said Thomas Foord, his heirs and assigns."

"All that *the said manor*, and the said messuages, lands, quit-rents, rights, royalties, liberties, privileges, hereditaments, and all and singular other the said premises hereby mentioned or intended to be hereby granted and released, with their and every of their appurtenances, save and except the said royalty of fishery or oyster dredging, and the right of taking oysters and other fish within the said manor, and the ground and soil of the said fishery, and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel or for the landing of merchandise within the said manor, or for the admission of freemen, or other payments for the regulation of the freemen and fishery there, and all other payments whatsoever at the water-court of free dredgers there, and all such like payments, and all manner of forfeitures, articles, and things which of right belong and are the property of the lord of the said manor by reason of any wrecks of the sea, or such other like rights and forfeitures arising within the limits of the sea-beach aforesaid,"—were limited, as to one-third, to Edward Foad, in fee, as to one other third, to John Nutt, in fee, and, as to the remaining third, to Stephen Salisbury, in fee.

And "all the said royalty of fishery or oyster-dredging, and the right of taking oysters, and other fish within the said manor, and all the ground and soil of the said fishery, extending as hereinafter is mentioned, and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any vessel

or for the landing of any goods or merchandise *within the said manor*, or for the admission of freemen, or other payments for the regulation of the freemen and fishery there, and all other payments whatsoever at the water-court of free dredgers there, and all such like payments, and all manner of forfeitures, articles, and things which of right belong unto and are the property of the lord of the said manor by reason of any wrecks of the sea or other such like rights and forfeitures arising within the limits of the sea-beach aforesaid, and all remedies for the recovery of the said premises respectively," — were limited to the said Thomas Foord, in fee.

The deed of release contained the following clauses:—

"And, in order to ascertain the boundary of the said oyster-fishery, and how far the right of the said Thomas Foord, his heirs and assigns, therein shall extend, it is expressly agreed by and between the said Edward Foad, John Nutt, Stephen Salisbury, and Thomas Foord, for themselves severally and respectively, and for their several and respective heirs and assigns, that from henceforth the south and south-east sides of the sea-beach of Whitstable aforesaid, as the same is and hereafter shall be thrown up by the sea from time to time, shall be considered and taken as the boundary between the lands of them the said Edward Foad, John Nutt, and Stephen Salisbury, their heirs and assigns, and the lands of the said Thomas Foord, his heirs and assigns; and that such sea-beach *and all the lands and grounds from thence unto the sea so far as the said fishery extends*, whether the same be more or less than the quantity of land now belonging to the said fishery, and all payments or dues for the anchorage of any ships or vessels or for the landing of any goods or merchandise there, and for the admission of freemen, and other payments for the regulation of the freemen and fishery, and all other payments whatsoever at the water-courts or courts of dredging there, and all wrecks of the sea and other manor rights and forfeitures there found, shall from thenceforth be held and enjoyed by and be the property of the said Thomas Foord, his heirs and assigns, subject to the right of the said company of dredgers in the said fishery:

"And, the better to effect the purpose of the now reciting indenture, the said Edward Foad, John Nutt, and Stephen Salisbury appointed the said Thomas Foord, his heirs and assigns, their attorney and attorneys, and did thereby give unto the said Thomas Foord, his heirs and assigns, power to appoint a steward or stewards and water-bailiff or water-bailiffs, or other usual officers of the said fishery, and to summon and hold all such water-courts or courts of dredging as should be necessary to be held for admitting freemen to participate in the rights of the said fishery with the present and future freemen thereof, and to impanel and swear any jury at such courts, and make all such by-laws and orders for better regulating the said company of dredgers as should be thought expedient and for the advantage of the company; and also to ask, demand, collect, and receive from all and every person and persons whomsoever all customary payments or dues for the anchorage of any ships or vessels, or for the landing of any goods or merchandise within the said manor, and for the admission of freemen, and other payments for the regulation of the freemen at the said courts, and all other dues, wrecks of the sea, and

such like manor rights and forfeitures which should be there found, and to detain and keep the same for the use of the said Thomas Foord, his heirs and assigns, and, upon receipt thereof, to give acquittances, &c., and, in cases of refusal, to bring actions," &c.

By the 88 G. 3, c. 42, the said free fishers and dredgers of Whitstable were incorporated. They have ever since carried on the fishery there to a great extent.

By indentures of lease and release bearing date respectively the 4th and 5th of June, 1793, and made between the said Thomas Foord of the one part, and the said Company of Free Fishers and Dredgers of Whitstable, in the said county of Kent, of the other part,—after reciting in the indenture of release the hereinbefore abstracted indentures of the 11th and 12th of October, 1791, a mortgage by the said Edward Foad to George Rigden, and the reconveyance by the said George Rigden, and the said abstracted indentures of the 24th and 25th of October, 1792; and reciting that the said purchase so made by the said Thomas Foord of the said royalty, fishery, and hereditaments, was by him contracted for on the part of the Company of Free Fishers and Dredgers aforesaid, and the sums of 800*l.* unto the said Edward Foad, and of 1530*l.* unto the said James Smith, making 2230*l.*, which were the consideration moneys in the said indenture of release of the 25th of October, 1792, mentioned to have been paid by the said Thomas Foord for the purchase of the said premises, were the moneys of the said company, and no part thereof of the said Thomas Foord, which he did thereby acknowledge,—it was witnessed, that, in consideration of the premises, and of 10*s.*, he the said Thomas Foord did grant, release, and confirm unto the said Company of Free Fishers and Dredgers (in their actual possession, &c.), and to their successors and assigns, All that the royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the manor of Whitstable, in the said county of Kent, *and the ground and soil of the said fishery*, extending as thereinbefore was mentioned; and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchoring of any ship or vessel, or the landing of goods or merchandise, within the said manor, or for the admission of freemen, or other payments for the regulation of the freemen and fishery there, and all other payments whatsoever at the water-court of free dredgers there, and all such like payments, and all manner of forfeitures, articles, and things which of right belonged unto and were the property of the lord of the said manor by reason of the wrecks of the sea or other such like rights and forfeitures arising within the limits of the sea-beach aforesaid, and all and singular other the premises which in and by the said recited indentures of lease and release of the 24th and 25th of October, 1792, became vested in the said Thomas Foord, his heirs and assigns, or in any person or persons whomsoever in trust for him and them; and all the reversion, &c.; and all the estate, &c.; and all deeds, &c.,—To hold the same unto and to the use of the said Company of Free Fishers and Dredgers, their successors and assigns, for ever.

The defendant was the owner of a small vessel called the *Amoret*; and, on the 29th of September, 1860, the said vessel cast anchor at Whitstable on the land covered by the water of the sea, and *below*

low-water mark: but the spot where the said vessel so anchored was and is within that portion of the manor of Whitstable and fishery aforesaid which is claimed by the plaintiffs under the above deeds, and under the circumstances herein stated, as their soil and freehold.

The plaintiffs' oyster-beds extend from the shore for about two miles out to sea; and the said vessel was anchored about half a mile from the shore, upon part of the land claimed by the said company, but not then used as oyster-beds.

The plaintiffs' claim was for 1s. for anchoring on the soil which they alleged to be theirs: and they gave evidence to prove, and the jury found, that, from 1775 continually down to the present time, they and those under whom they derived title had from time to time claimed as of right to take, and had taken, the sum of 1s. from vessels casting anchor within that portion of the manor on which the defendant's vessel had cast anchor, and that they claimed to take it as a customary payment for such use of the soil.

The defendant at the time in question resided and dwelt within the Cinque Ports, at Whitstable,—Whitstable being part of the port of Faversham, which is a limb of Dover. The said vessel at the time she anchored as aforesaid was trading to Whitstable.

The charter of Edward the 4th in reference to the exemption of the Cinque Ports from certain dues, was put in evidence at the trial by the defendant: see Jeake's Charters of the Cinque Ports.

On the part of the defendant it was submitted that he was entitled to the verdict, on the following grounds,—first, that the soil of the sea where his vessel was anchored, being below low-water mark, was vested by law in the Crown, and could not be held by a subject,—secondly, that the company had no right to claim any payment for such anchorage,—thirdly, that, if ever the right to demand a payment for anchorage was vested in the lord of the manor of Whitstable, that right was extinguished and destroyed when the manor was divided into two parts (which for distinction were at the trial called respectively the terrestrial and the marine manor),—fourthly, that, if the right was not so extinguished and destroyed, the owner of the terrestrial portion of the manor should have been joined as co-plaintiff,—fifthly, that the defendant was under the Cinque Ports charter proved at the trial exempt from the said claim for anchorage.

In Hilary Term, 1861, a rule nisi was obtained, on the part of the defendant, to enter a nonsuit, on the following grounds,—first, that the soil of the sea where the defendant's vessel was anchored was vested in the Crown,—secondly, that there was no evidence of any grant of the said soil to the plaintiffs, and that the judge presiding at the trial ought not to have left it to the jury to say whether upon the evidence they were satisfied that the plaintiffs had the alleged right,—thirdly, that, if the soil was vested in the plaintiffs, they had no right to claim any payment for such anchoring,—fourthly, that there was no evidence to support the plaintiffs' case or their right to take the toll claimed, and that the learned judge should have so directed,—fifthly, that, if ever the right to demand a payment for anchorage was vested in the lord of the manor of Whitstable, that right was extinguished and destroyed when the manor was divided,—sixthly, that, if the right was not so extinguished or destroyed, the owner of the

terrestrial portion of the manor should have been joined as a co-plaintiff,—seventhly, that the defendant was under the charter proved at the trial exempt from the claim made,—eighthly, that the verdict was against the evidence.

Upon the argument of this rule, the Court of Common Pleas held, that, it being competent to the Crown to grant the soil of the sea-shore and the right to anchorage, the evidence given at the trial was sufficient to justify the presumption of a grant having a legal origin; that the right of distress was incident to the right to the anchorage; and that the right to the anchorage was not destroyed by the severance of the marine from the terrestrial part of the manor; and accordingly the rule was discharged: see 11 C. B. N. S. 387 (E. C. L. R. vol. 103).

The defendant appealed to the Exchequer Chamber; but the decision of the Court of Common Pleas was affirmed: see 13 C. B. N. S. 853 (E. C. L. R. vol. 106). The defendant then appealed to the House of Lords, and the case was argued there by *Prentice* and *F. M. White*, for the appellant (the defendant below), and by *Lush*, Q. C., *Denman*, Q. C., and *Needham*, for the respondents, the plaintiffs below.

The arguments were substantially the same as those urged below: it will therefore be sufficient to enumerate the authorities cited, which were as follows:—

For the appellant,—*Warren v. Prideaux*, 1 Mod. 104; *The Mayor of Nottingham v. Lambert*, Willes 111; *Lord Pelham v. Pickersgill*, 1 T. R. 660; *The Mayor of Northampton v. Ward*, 2 Stra. 1238; *The Case of the London Wharves*, 1 W. Bl. 581; *The Attorney-General v. Burrige*, 10 Price 350; *Anonymous*, 1 Campb. 517, n.; *Blundell v. Catterall*, 5 B. & Ald. 268 (E. C. L. R. vol. 7); *Lord Falmouth v. George*, 5 Bingh. 286 (E. C. L. R. vol. 15), 2 M. & P. 457; *Rickards v. Bennett*, 1 B. & C. 223 (E. C. L. R. vol. 8), 2 D. & R. 389 (E. C. L. R. vol. 16); *Scratton v. Brown*, 4 B. & C. 485 (E. C. L. R. vol. 10), 6 D. & R. 536; *The Duke of Somerset v. Fogwell*, 5 B. & C. 875 (E. C. L. R. vol. 11), 1 D. & R. 747; *Williams v. Wilcox*, 8 Ad. & E. 333 (E. C. L. R. vol. 35), 3 N. & P. 606; *The Mayor of Exeter v. Warren*, 5 B. & C. 773, Dav. & Mer. 524; *The Mayor of Colchester v. Brooke*, 7 Q. B. 339 (E. C. L. R. vol. 53); *Martin v. Waddell*, 16 Peters (U. S.) 369; *Den v. New Jersey*, 5 How. U. S. Rep. 426; *Post v. Nunn*, 1 South. (N. Jersey) Rep. 61; *Callis on Sewers*, p. 53; 2 Roll. Abr. 272; Com. Dig. *Prerogative* (D) 48, *Toll* (C); Bac. Abr. *Custom* (D); *Hale de Jure Maris*, pp. 22, 31, 36; *Hale de Portibus Maris*, p. 74; *Erskine's Institutes*, Book 1, tit. 8, s. 17; *Bell's Principles of the Law of Scotland*, ss. 645, 646; *Chitty's Prerogatives of the Crown* 143; *Scriven on Copyholds*, p. 666; 3 *Kent's Commentaries*, Part 6, § 52; *Angell on Watercourses*, c. 13, § 558; *Angell's Tidal Waters*, p. 42; *Wharton's Law Lexicon*, *Anchorage*.

For the respondents,—*Hale de Jure Maris*, p. 31; *Hale de Portibus Maris*, pp. 36, 46; *Wharton's Law Lexicon*, *Anchorage*.

LORD WESTBURY, C.—My Lords,—In consequence of some uncertainty in the statements of the special case, it was admitted by the appellant at the Bar of the House that the payment demanded by the respondents had been made to the lords of the manor of Whitstable from time immemorial, and that the vessel of the appellant cast anchor

within the limits of the oyster-bed or fishery claimed by the respondents.

The case appears to me to depend on principles which have long been settled. The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is by law vested in the Crown; but this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with, the right of navigation, which belongs by law to the subjects of the realm. The right to anchor is a necessary part of the right of navigation, because it is essential for the full enjoyment of that right. If the Crown, therefore, grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right; and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right.

The respondents claim to be entitled by Royal grant to a portion of the bed or soil (below low-water mark) of the arm of the sea which forms the estuary of the Thames opposite to the manor of Whitstable, in the open sea, a sea way, being the high road for the passage of vessels; and they claim a sum of one shilling for every vessel which casts anchor within that part of the bed or soil which is claimed by them. But this claim interferes with the free enjoyment of the right of navigation subject to which the original grant must be taken to have been made, and it cannot be supported on the ground of ownership of the soil.

If the payment be claimed as an ancient anchorage due, some facts must be shown which either prove, or from which it can be inferred, that the soil claimed by the respondents was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered to the public in respect of which the alleged grant was made; but nothing of the kind appears, and no such case can be presumed or inferred from the mere fact of an immemorial payment. No such case is made by the respondents, and the payment is demanded merely on the ground of its having been immemorially made to the lords of the manor of Whitstable and their assigns in respect of the ownership of the site—an ancient oyster-fishery now vested in the respondents.

Anterior to Magna Charta, by which such grants were prohibited, a several fishery in an arm of the sea or navigable river might have been granted by the Crown to a subject. The present fishery of the respondents must be taken to have been so granted; and the grant might include a portion of the soil for the purposes of the fishery. But this, like every other grant, whenever made, must have been subject to the public right of navigation; and I cannot suppose that the establishment of oyster-beds for the private emolument of the proprietors could be regarded by the law as an equivalent to the public for the imposition of this tax (at its commencement not inconsiderable) on the right of navigation.

Speaking with great respect for the learned judges in the court below, it appears to me that the error of the judgments consists in not adhering to the clear principle that the grant by the Crown of any part of the bed or soil of this estuary below low-water mark, whether

for a fishery or not, must by the common law have been subject to the public right of navigation, of which the right to anchor is an essential part; that no property can be claimed in the soil except subject to this over-riding right; and that there is no fact or circumstance to warrant a presumption that any corresponding benefit was given to the public in return for the imposition of this anchorage due. It is not suggested on either side that any further facts remain to be ascertained; and I see no utility, therefore, in directing a new trial. I shall therefore humbly move your Lordships that the judgment of the court below be reversed.

LORD WENSLEYDALE.—My Lords,—From the loose and unsatisfactory manner in which this case has been stated, I think that your Lordships will find a difficulty in giving a satisfactory opinion upon some of the questions proposed to be raised. Speaking for myself, I must say that I should wish a further inquiry to take place, and should therefore have advised to direct a new trial between the parties. But, having heard what my noble and learned friend the Lord Chancellor has said upon that subject, and being acquainted also in some degree with the opinion of my noble and learned friend opposite, I do not mean to persist in that, although my own notion is that it is consistent with the statement made upon the record that some real legal ground might be found for the establishment of the right of anchorage; and therefore, so far as I am concerned, I would rather that the case should undergo further investigation.

I perfectly agree, that, from long enjoyment of a privilege, in this case of demanding the payment of anchorage for a period of ninety years, from 1775 to 1864, every reasonable presumption may be made that it has continued from time immemorial; but, where the privilege requires more than immemorial enjoyment in order to be legal and valid, some other facts must exist besides mere long enjoyment; and there must be some proof of those facts.

Now, to make a grant of anchorage in an arm of the sea where the fundus maris is the property of the Crown, but where every subject of the Crown has a right to navigate and to cast anchor when and where he thinks fit, as a necessary means of safe navigation, he cannot be deprived of that right by an usage, however long, unless there is some evidence of a sufficient consideration, of some advantage to the subject, to enable the Crown to confer upon a particular individual the privilege of receiving compensation from the subject, and thus depriving the subject of his undoubted right.

On this record it appears to me there is not sufficient evidence of any such facts.

It is much to be regretted that the great inconvenience of the technicalities of a bill of exceptions or special verdict being now in many cases done away with, and a statement of facts allowed on rules to show cause instead, that somewhat more pains and care should not be taken to state all that is really material. I think that this case is wanting in this respect. Here is no proof, I think, except the enjoyment of anchorage for rather less than ninety years. The case is extremely defectively stated on both sides.

Upon the case, as found, some matters are very clear. The manor of Whitstable existed before the Statute of Quia Emptores, 18 E. 4,

c. 15, and there was an immemorial Company of Oyster Dredgers there, who had established before time of legal memory, and before the statute of Magna Charta, an oyster-fishery on the sea-shore of Whitstable, within the limits of that fishery as claimed by that company, but not occupied by oysters. The defendant's vessel cast anchor. Whether the place in which the anchor was cast was actually within the limits to which the company was really entitled, and whether the anchor was cast because the vessel was in danger, or without absolute necessity, and purely voluntarily, is not stated. A claim for anchorage of 1s. had been paid regularly since 1775 for anchoring within that portion of the manor in which the defendant's vessel had cast anchor; and that was claimed to be taken as a customary payment for the use of the soil.

In 1791 the manor of Whitstable and the fishery of Whitstable, being a royalty of fishery or oyster-dredging within the said manor, were conveyed to Edward Foad and James Smith, in equal moieties, as tenants in common, in fee.

By deeds of the 24th and 25th of October, 1792 (between whom does not appear), the manor was declared to be the property of Foad, Nutt, and Salisbury; and the rights of the lord of the manor in the fishery, and the ground and soil thereof from the land boundaries of the fishery, and the customary payments usually made to the lords of the manor for or on account of the anchorage of any ship or the landing of any goods, and also wrecks of the sea, were declared to be the property of Thomas Foord, his heirs and assigns: and the release contains a clause that the south-east and south-west sides of the sea-beach at Whitstable, as the same is or shall be thrown up by the sea, shall be taken to be the boundary between the lands of Foad, Nutt, and Salisbury, and their heirs, and those of Foord and his heirs; and from thence into the sea as far as his fishery extends, whether the same be more or less than the quantity of land then belonging to the fishery.

On the 30th of April, 1793, an act of parliament passed for incorporating the Company of Free Fishers and Dredgers: and on the 4th and 5th of June, 1793, Foord conveyed the Royalty of fishery and fishing oysters, and the dues of anchorage and landing, to the Company of Free Fishers and Dredgers.

The separation of what has been termed the terrestrial part of the manor from the fishery has been very properly held to be immaterial by the judges of both courts.

Evidence was then given of a charter of Edward IV., exempting the inhabitants of the Cinque Ports from terrage and other like charges; and that the defendant was an inhabitant. But it is wholly unnecessary to trouble ourselves with the question whether anchorage was included in the word terrage or not; for, the lord of the manor of Whitstable's title dated from a period long before the reign of Edward IV., and the charter of Edward IV. could confer no exemptions.

There is no difficulty also in saying that the jury would be perfectly right in presuming that the payments which had been made ever since 1775 were made from beyond time of legal memory to the lord of the

manor of Whitstable; though that question does not appear to have been regularly put to them.

Again, it might be properly presumed that the oyster-fishery was granted to the lord of the manor.

Again, it is hardly necessary to discuss the question whether the vessel, on the occasion that she cast anchor, was in peril or not, or the casting of anchor was in a sense voluntary. If the company have a right to anchorage in any case, I should think the right would exist in all cases.

But the principal difficulty I feel, is, that the right to the soil of the fundus maris within three miles below low-water mark, and to the fishery in it, though granted before Magna Charta, is undoubtedly subject to the rights of all subjects to pass in their vessels in the ordinary and usual course of navigation, and to take the ground there, or to anchor there at their pleasure, free from toll, unless the toll is imposed in respect of some other advantage conferred upon them, or at least on the public.

Subjects may have that advantage where they anchor in a port, in respect of the owner of the port being obliged to maintain it and keep it sufficiently repaired and ready for the reception of ships; and it may be that the company of dredgers may have had the anchorage assigned to them, beyond the time of memory, by the owners of the port, who may have had the right of anchorage immemorially by virtue of the rights of the port. But the case supplies no materials to enable us to come to that conclusion. We are told nothing about the port, its position, or the obligation of the owners.

It would be our duty, if the case admitted of it, to find a legal origin for a right so long enjoyed. It might also be due by right as a compensation for the injury, by anchoring within the limits of the oyster-fishery, to the brood of oysters. The grant of an oyster-fishery beyond the time of legal memory, which would require some expense and trouble to establish and keep up, would, I am strongly inclined to think, justify the imposition of such toll within the limits where oysters are placed to breed. Mr. Justice Coltman, a very able judge, in the case of *The Mayor of Colchester v. Brooke*, 7 Q. B. 355 (E. C. L. R. vol. 53), thought that the party might be liable by ancient custom to pay to the lord of the manor a reasonable payment, as the owner of the soil where there were oyster-beds, for grounding on the soil.

But, whether the place where the anchor was cast in this case was within the true boundaries of the immemorial oyster-beds, does not appear to be distinctly stated in the case; or whether the particular place where the anchor was laid was near an oyster-bed, or anchorage there did then or could at any time prejudice the actual fishery or its extension, does not appear. It might be perfectly innocuous.

For these reasons, I think that the plaintiffs are not entitled to succeed. If my noble and learned friends agreed to it, I should prefer that there should be a new trial; but I do not wish to persist in that against their opinion.

LORD CHELMSFORD.—My Lords,—The principal question intended to be raised between the parties in this appeal is, whether the respondents, “The Company of Free Fishers and Dredgers of Whitstable,”

who are the owners of a fishery for the growth and improvement of oysters within the limits of the manor of Whitstable, are entitled to demand from the appellant a payment for anchoring his vessel within the manor; their title to demand such payment being derived from the lord of the manor, whose predecessors have from time immemorial received a customary payment "for and on account of the anchorage of any ship or vessel within the said manor."

The special case upon which the judgment of the Court of Exchequer Chamber was given is very loosely and imperfectly drawn, and omits many facts which are necessary to raise with proper precision the point to be decided. For instance, it is not stated whether the claim for anchorage applies to all vessels, whether anchoring within the manor without any actual necessity, or driven to do so by stress of weather or by the exigencies of navigation. Again, it is said that the appellant's vessel was anchored upon a part of the land "*claimed* by the company," and that their claim was for anchoring upon the soil *alleged* to be theirs, not stating that it actually was theirs. And, instead of claiming the anchorage-due as a payment made from time immemorial, it is only alleged that "the plaintiffs gave evidence to prove, and the jury found, that, from 1775 continually down to the present time, they, and those under whom they derived title, had from time to time claimed as of right to take and had taken the sum of 1s. from vessels casting anchor within that portion of the manor on which the defendant's vessel had cast anchor, and that they claimed to take it as a customary payment for such use of the soil."

The learned counsel on both sides expressed their desire to have the important question, whether, under the circumstances of the case, the anchorage-due could have a lawful origin, decided by the House; and for this purpose it was admitted on the part of the appellant that the payment for anchorage had been received by the lords of the manor of Whitstable, without interruption, from time immemorial, and that his vessel cast anchor upon the soil of the company within the limits of their oyster-fishery, and that there was no particular necessity for her coming to an anchor there. It may be observed, that, if the payment can legally be claimed in respect of the soil, there is the more reason why it should be paid by those who are driven by necessity or led by their own convenience to anchor upon it, because they are the persons who really derive benefit from it.

In considering the question, it is necessary to bear in mind that it applies exclusively to the claim of a toll or due for anchoring on the high seas, and not in any port or haven. I mention this in the outset, because Mr. Lush towards the close of his argument contended that the toll might be regarded as being claimed in respect of a port, Whitstable being a limb of Faversham, one of the Cinque Ports. The claim had never been put upon this ground in all the former discussions in the courts below; and it is clearly insufficient to sustain it. Mr. Lush admitted that the respondents were not the owners of the port, but suggested the possibility of the lords of the manor having obtained the port by devolution from the original owner. There is no ground whatever for this presumption; and, even if there were, the anchorage-due is claimed, not in respect of the ownership of a port, but as a payment "of right made to the lord of the manor."

The claim, too, is made solely in his character of lord, and not as the owner of a fishery; so that no question of competition between the right of passage of the public in the highway of the sea, and the right of an individual to have a several fishery there, can possibly arise.

The question is thus simply raised, whether, at any period of the history of this country, the Crown could have imposed upon the subjects a toll for anchoring their vessels upon the high seas within the limits to which its right to the soil of the sea-shore extends, without any other consideration moving from the Crown but the permission to use the soil for this purpose.

The case of the respondents is very shortly and distinctly stated by Lord Chief Justice Erle in his judgment in this case. He says: "The soil of the sea-shore to the extent of three miles from the beach is vested in the Crown; and I am not aware of any rule of law which prevents the Crown from granting to a subject that which is vested in itself. If the Crown did grant the soil of the shore in question, it may well be that the right of taking an anchorage-toll of 1s. was granted with it."

With great respect for the learned Chief Justice, I do not think it can be assumed as an unquestionable proposition of law, that, as between the Crown and its subjects, the sea-shore to the extent mentioned is the property of the Crown in such an absolute sense as that a toll may be imposed upon a subject for the use of it in the regular course of navigation. In stating the right of the Crown in the sea-shore, the text-writers invariably confine it to the soil between high and low-water mark. The three miles limit depends upon a rule of international law, by which every independent state is considered to have territorial property and jurisdiction in the seas which wash their coasts within the assumed distance of a cannon-shot from the shore. Whatever power this may impart with respect to foreigners, it may well be questioned whether the Crown's ownership in the soil of the sea to this large extent is of such a character as of itself to be the foundation of a right to compel the subjects of this country to pay a toll for the use of it in the ordinary course of navigation.

In the case of *The Mayor of Colchester v. Brooke*, 7 Q. B. 374 (E. C. L. R. vol. 53), Lord Denman, in delivering the judgment of the court, said: "The right of soil in arms of the sea and public navigable rivers which the Crown has, independently of any ownership in the adjoining lands, must in all cases be considered as subject to the public right of passage, however acquired; and any grantee of the Crown must of course take subject to such right." Now, if the public possess this paramount right of passage, it seems to be rather inconsistent with such right that they should be compelled to make any payment, however small, for the liberty to exercise it. And the respondents must be driven to contend, either that the right in its origin was not an absolute one, but that the Crown might permit it only under certain conditions, or that the right to navigate does not include in it the power to anchor at pleasure.

We were properly told in argument, that, in considering the question, we ought not to confine our view to the present time, but should look to the early period of our history, when the powers of the Crown

were much more ample and unfettered than they have since been. But I have searched in vain amongst the earlier authorities to find any clear and distinct proof of the Crown ever having claimed such a toll as that in question, without giving some benefit to the subject as a consideration for it. Indeed, it was admitted in the argument for the respondents, that some consideration for the right to take anchorage-dues was necessary to be shown; but it was said that the mere use of the soil of the Crown by casting an anchor upon it was a sufficient consideration. None of the authorities referred to, however, support so wide a proposition. As far as I can discover, a payment for anchorage has always been claimed in respect of a port or harbour, the creation or erection of which is for the common benefit of navigation, and constitutes in itself a sufficient consideration.

Lord Hale, in enumerating the duties which arise from the *jus dominii* or franchise of a port, mentions, "Anchorage, as a prestation or toll for every anchor cast there:" *De Portibus Maris*, c. 6, p. 74. It was said by the counsel for the respondents, that it appears from the same high authority that toll might be taken for anchorage in a haven. This is true, but apparently only where the haven is within the limits of the franchise of a port. Hale describes a "haven" to be "a place of a large receipt and safe riding of ships, so situate and secured by the land circumjacent that the vessels thereby ride and anchor safely, and are protected by the adjacent land from dangerous and violent winds:" c. 2, p. 46. But he afterwards uses the word to denote a portion of the port itself, as in page 54, where he says,— "In the consideration of a port, there are these two things involved, viz., first, the consideration of the interest of the soil both of the shore or town, which is the *caput portus*, and of the soil of the haven itself wherein the ships do ride and apply." And that the ownership of the soil of a haven, unless it is within a port, will not entitle the owner to take anchorage-dues for the use of it, is laid down in page 78, in these terms:—

"The ownership or propriety, is where the King, or common person, by charter or prescription, is the owner of the soil of a creek or haven where ships may safely arrive and come to the shore. This interest of propriety may, as hath been shown, belong to a subject. But he hath not thereby the franchise of a port, neither can he so use or employ it unless he hath had that liberty time out of mind, or by the King's charter." And, after stating that the owner may bring in his own goods not customable, &c., he adds, "but he may not use it as a public port, nor take toll or anchorage there." Mr. Justice Williams quotes this passage, in delivering his judgment in the Common Pleas, and says that, "it clearly assumes, that, if the owner had a Royal grant, he might take anchorage." I do not, however, understand this to be Lord Hale's meaning. It appears to me that the correct interpretation of his language is, that, without the King's grant or charter, a subject cannot have the franchise of a port, and, without having a port, he cannot take toll or anchorage, which are dues arising from and incident to it.

The counsel for the respondents, in their argument in support of their claim, insisted strongly upon the analogy presented by the right of fishing in the sea, which *primâ facie* all subjects of the realm

possess, and of which they might formerly have been deprived by a grant from the Crown to an individual of an exclusive right of fishing. But, in the first place, it does not appear that such a right of several fishery was ever granted in what may be called the open sea. Lord Hale states that "the King may grant fishing within a creek of the sea, or in some known precinct, that hath known bounds, though within the main sea" (page 17); and, again, that "a subject may by prescription have the interest of fishing in an arm of the sea, in a creek or part of the sea, or in a certain precinct or extent lying within the sea" (page 18). But, even if such a grant could have been lawfully made so as to extend beyond these defined limits, yet the right of several fishery appears to have been always subservient to the right of navigation; and the King could not enable the owner of a fishery to do any thing which, though within the competency of an exclusive owner, was an obstruction to the passage of ships upon the seas.

In *The Mayor of Colchester v. Brooke*, 7 Q. B. 355 (E. C. L. R. vol. 53), Mr. Justice Coltman suggested, that, although parties who wish to go up a navigable river are not obliged to wait for a particular time of the tide, yet it might be law, that, if they take the ground, they may be liable to make a reasonable payment to the owner of the soil. This opinion is not stated with any positiveness; but yet it may be correct as applicable to a navigable river, because the owner of the soil may have given consideration for the payment, by rendering the river navigable.

The necessity of discovering a quid pro quo for the claim in this case has driven the respondents to contend that the establishment of the oyster-fishery belonging to the respondents, being for the public benefit, might be considered to be a sufficient consideration for the imposition of the toll upon anchorage. It is difficult to understand how a benefit wholly unconnected with navigation, and not extending to the public generally, can be made the legal foundation for a local payment from vessels anchoring within a particular district. There is no reason why, if good to this extent, it should not be sufficient for a similar charge for all vessels casting anchor upon the soil of the Crown in any other part of the seas round this island.

I have, therefore, arrived at the conclusion that the undoubted right of the public freely to navigate the highway of the sea cannot be restricted by the imposition of any payment whatever, unless some good consideration can be shown for it; and the respondents have failed to establish any other ground of title in the lords of the manor to the anchorage-due than the mere use of their soil. This I consider to be wholly insufficient to justify the demand in question, unless it can be held that the right of navigation does not include the right of anchoring, which can hardly be seriously contended.

I admit that every intendment ought to be made in favour of a payment which has been uninterruptedly received time out of mind, supposing it presumably capable of a lawful origin; but, not being able to discover any ground upon which this claim of an anchorage-due could have had a legal commencement, the case of *The Mayor, &c., of Nottingham v. Lambert*, Willes 111, is an authority for showing

that no length of prescription can give it validity. I think the facts sufficiently admitted to render a new trial unnecessary.

I am therefore of opinion that the judgments of the Exchequer Chamber and of the Court of Common Pleas ought to be reversed, and judgment to be entered for the defendant.

Judgment reversed.

RALSTON v. SMITH. Feb. 24.

1. The object of the 5 & 6 W. 4, c. 83, authorizing disclaimers, was to enable the patentee, where his specification contains a sufficient and good description of a useful invention, but that description is imperilled or hazarded by something being annexed to it which is capable of being severed, leaving the original description, in its integrity, good and sufficient, without the necessity of addition, to lop off the vicious matter, and leave the original invention as described in the specification untainted by that vicious excess. But it is not competent to him to convert a specification bad, in the sense of its containing no description of any useful invention at all, into a good specification, by adding words which would convert that which is a barren and unprofitable generality into a specific and definite and practical description.

2. The expression "new manufacture" in the 21 Jac. 1, c. 3, not only comprehends "productions," but it also comprehends the means of producing them,—a new machine, for instance, or a new combination of machinery, or a new process, or an improvement of an old process.

3. The use of a roller and a bowl for calendering and embossing fabrics, and the means of regulating the relative speed of their motion, was well known. In the process of calendering, the roller was smooth, and the speed of the roller and the bowl was unequal: in the process of embossing, the roller was engraved or patterned, and the speed of the roller and of the bowl was equal. The plaintiff took out a patent for a combination of the engraved or patterned roller with the differential speed of the roller and the bowl, in order to effect the two processes by one operation. The patent professed to be for "improvements in embossing and finishing woven fabrics, and in the machinery or apparatus employed therein;" and the novelty professed to consist in the use of rollers having "any design grooved, fluted, engraved, milled, or otherwise indented upon them." Finding that the effect of the differential speed, where the roller was engraved or indented longitudinally, was, to destroy the fabric, the plaintiff entered a disclaimer, by which, besides abandoning the latter branch of the title of the original patent, he disclaimed "the use of any other description of designs upon the surface of the roller except circular grooves, flutes, or indentations made around its surface:"—

Held, by the House of Lords,—affirming the judgment of the court below,—that the process described in the original specification was not the proper subject of a patent; and that the disclaimer was bad, as attempting to turn that which was an impracticable generality into a specific invention not described in the original specification.

4. Spiral grooves on the roller, which in their effect could not be practicably distinguished from circular grooves, would be an infringement of the patent.

THIS was an action for the infringement of a patent granted to the plaintiff on the 23d of November, 1858, for "Improvements in embossing and finishing woven fabrics, and in the machinery or apparatus employed therein."

The defendant pleaded,—first, not guilty,—secondly, that the plaintiff was not the true and first inventor of the invention mentioned in the declaration, and not disclaimed,—thirdly, that the supposed invention mentioned, and not disclaimed, was not a new invention,—fourthly, that the plaintiff did not within the time, &c., file a proper description of the invention,—fifthly, that the disclaimer extended the exclusive right, &c.,—sixthly, that the privilege in the declaration mentioned, and not disclaimed, was not for the sole working and making of any manner of manufacture. Issue thereon.

The cause was tried before Erle, C. J., at the sittings at Westminster after Trinity Term, 1860.

The specification contained the following description of the plaintiff's alleged invention :—

“I employ a roller of metal, wood, or other suitable material, and groove, flute, engrave, mill, or otherwise indent upon it any desired design, and cause it to revolve with a bowl or bowls of paper or other substance, and, by means of gearing well known to mechanics, I give the circumference of the pattern-roller a quicker motion than the circumference of one of the bowls, so as to obtain a frictional action upon the surface of the fabric, as well as pressure, so that, if the fabric is moved transversely when fed to the machine, an infinite number of watering patterns may be given to the fabric at one operation or passage; but, if two operations be given, moire antique or other varieties may be obtained, which can be still further varied, as desired, according to the number of times the fabric is allowed to pass through the machine.

“In addition to the variety of the pattern, a bright finish or lustre is given to the fabric by means of the friction or rubbing action of the two surfaces of the roller and the bowl.

“I also obtain the same result by reversing the arrangement, and causing the circumference of the bowl to move quicker than the circumference of the roller, so as to obtain a similar frictional or rubbing action, the gearing being simply required to be adapted for the purpose.

“It is well known, that, for calendering purposes, plain or polished rollers have necessarily been driven at a greater speed than the bowl or bowls; but hitherto it has not been considered practicable to give pattern-rollers the same relative movement.

“I claim as my invention, and which to the best of my knowledge and belief has not hitherto been used within the realm, the employment of grooved, fluted, engraved, milled, or otherwise indented rollers of metal, wood, or other suitable material, driven at a greater speed than the bowl or bowls connected with them, so as to exert a rubbing or friction upon the material submitted to their action, and thereby produce an infinite variety of pattern, as well as a bright finish or lustre, and also reversing the operation by giving the bowls a quicker motion than the pattern-roller.”

On the 28th of January, 1860, the plaintiff filed a disclaimer, in which he said,—“I disclaim the latter portion of the words of the title, ‘and in the machinery or apparatus employed therein,’ so that the title shall henceforth be in these words,—‘Improvements in embossing and finishing woven fabrics.’ And I disclaim the use of any pattern-rollers in performing my invention, except those which are made of metal or other suitable material, and have circular grooves, flutes, or indentations made around their surfaces. I disclaim the use of any other description of design upon the surface of such rollers, except such circular grooves, flutes, or indentations as aforesaid. And I also disclaim the production of watering patterns upon a fabric at one operation or passage of it between a pattern-roller and a bowl, against which it works, except when the grooves, flutes, or indentations around the surface of such roller are as numerous as the warp-threads in the fabric to be operated upon, or nearly so. And I disclaim all parts of the description of my said invention contained in my said specification which are not contained in the said description

as hereby altered, and I hereby alter such description, and that the same shall henceforth describe the undisclaimed parts of the said invention, in these words, &c.

"I employ a roller of hard metal or other suitable material, and make grooves, flutes, or indentations around it, and cause it to revolve with a bowl or bowls of paper or other suitable substance, and by means of gearing well known to mechanics I give the circumference of the pattern-roller a quicker motion than the circumference of one of the bowls, so as to obtain a frictional action upon the surface of the fabric, as well as pressure. If the grooves, flutes, or indentations around the roller are as numerous as the warp-threads in the fabric to be operated upon, or nearly so, or if the fabric has already passed through between the roller and the bowl, and the fabric has slight transverse motions given to it when fed into the machine, an indefinite number of watering patterns may be given to the fabric at one operation or passage. If further operations be given varying the extent of the transverse motions, moire antique or other varieties may be obtained, which can be further varied, as desired, according to the number of times the fabric is allowed to pass through the machine. In addition to the variety of patterns, a bright finish or lustré is given to the fabric by means of the friction or rubbing action of the surface of the roller. I may also obtain the same result by reversing the arrangement, and causing the circumference of the bowl to move quicker than the circumference of the roller, so as to obtain a similar frictional or rubbing action by rubbing the surface of the fabric against the roller, the gearing being simply required to be adapted for the purpose. It is well known, that, for calendering purposes, plain or polished rollers have necessarily been driven at a greater speed than the bowl or bowls; but hitherto it has not been considered practicable to give pattern-rollers the same relative movement, so as to obtain any beneficial result.

"Having thus fully described my invention and the mode of carrying the same into effect, I claim as my invention the employment of grooved, fluted, or indented rollers of hard metal or other suitable material, driven at a greater speed than the bowl or bowls connected with them, so as to exert a rubbing or friction upon the fabric submitted to their action, and thereby produce an indefinite variety of pattern, as well as a bright finish or lustre, and also reversing the operation, by giving the bowl a quicker motion than the pattern-roller."

The evidence in chief of the plaintiff was in substance as follows:—"I am an engraver and calico-printer. Before my patent, there was a known process called calendering effected by a pair of rollers, or a roller and a bowl, the cloth passing between the two. The roller and bowl moved at different surface speeds, for glazing purposes only; that is to say, when there was a gloss to be produced on the surface of the cloth, there was a different surface speed: the surface of the roller produced a sort of frictional effect upon the surface of the cloth. There were other processes for finishing cloth for embossing, such as produced watering appearances. For embossing, a roller and a bowl were used, and the roller was engraved. The bowls were made of paper, made very hard by pressure. The roller turned the bowl with-

out any gearing. The surface speed of both was the same. For calendering, to produce a glossy surface, there was gearing: the relative motions of the roller and the bowl could be varied by alterations in the gearing, by altering the relative sizes of the wheels and the numbers of their teeth. I had been employed as an engraver in engraving rollers for calico-printers and embossers: and it happened to me once, that, after sending a person an engraved roller, complaint was made about the effect of it in embossing, that I had set it too sharp, and that it cut the cloth. I altered it, and made the flutings or projecting surface shallower. After I had made this alteration and sent it back, the purchaser of the roller came to me again, and also sent it back, stating that it had lost its lustre: the projecting lines were too flat upon the surface. In embossing in this way, the cloths are generally calendered before they are embossed. To have a high gloss, this must be done. I altered the roller, and put some cloth in it. In going through the regular calendering process I made a slip, and very nearly cut my hand. When I took the bit out, it had a particular effect." [He then described as the result of subsequent experiments, that he found he could produce watering patterns, as well as the effect of embossing, by one and the same operation: and he proceeded,]—"In performing my invention, if a slight lateral motion is given to the cloth as it goes into the machine, that produces the watering effect: a larger extent of motion produces the moire antique: the chief difference is the size of the pattern: there is an endless variety. In working with the roller and the bowl according to my invention, I give the roller a greater surface speed: that enables me to produce the glossiness upon the surface of the cloth, and at the same time to produce the pattern. Some time after I had produced my specification, I found that there were some descriptions of patterns upon rollers that could not be used in this way: and I put in a disclaimer. There were some descriptions of wooden rollers that would not do, and therefore I confined my claim to metal only. In performing my invention with my roller, I have in the pattern-roller made circular indentations. Round longitudinal indentations will not do."

On cross-examination, the plaintiff said: "My first model had circular grooves, complete circles round the cylinder in endless lines; each circle complete in itself: separate rings, not spiral. For the purposes of my patent, I did not use anything but circular grooves or ringed grooves for embossing: for the purpose of my patent, I had not used any but circular grooves up to the time of my specification: they were circular grooves, or separate rings, with differences in the width of the grooves. I made them by milling or by engraving. There is no new machinery used in giving this difference of surface velocity, to what was known before. Circular grooves were used for embossing: there is nothing new in circular grooves themselves. I do not know that I had observed that they were used in varying ratios to the number of warps in the material. The first that I used was much the same sort of thing as had been used before, in proportion to the number of grooves. The giving a slight lateral motion to produce a slight lateral effect, was a thing that had been done and was well known before, in creeling cloths: that gave what is called the watered surface. The moire antique was never done before upon cotton, but

upon silks. Some descriptions of rollers mentioned in my specification would not succeed in the material. The patent included wood. I disclaimed it, and confined it to metal. I do not know that anybody informed me that I should limit my invention to rollers with circular grooves, and that other patterns would not do. I discovered that myself. No material besides metal will beneficially answer the purpose of the roller, for what I call my invention. Other things besides paper will do for the bowls. Wood will: leather would; so would glass; but not every material."

In re-examination, the plaintiff said he had never before known calendering and embossing produced by a single operation; that he had known transverse motions given in passing two pieces together through the rollers in this way; that he had known it done in this way when the metal roller went at the same velocity as the bowl; but he had never known it applied when the velocity was different.

At the close of the case, the counsel for the defendant objected,—first, that the alleged invention was a mere application of old processes, and not the subject of a patent,—secondly, that the specification did not describe any invention, and that the process described was impracticable—thirdly, that, at the date of the specification, the plaintiff had not invented what he now claimed as his invention,—fourthly, that the disclaimer was void, because it departed from the specification, and also because it stated that the rollers might "be made of metal or other suitable material," without giving any criterion of suitability,—fifthly, that the claim as it then stood was as extensive as in the original specification, and was too large, and therefore bad,—sixthly, that the specification, as altered, did not state whether the production of watering patterns was claimed,—seventhly, that the disclaimer confined the claim to the use of rollers with rings, and, as the defendant had used spirals only, he had not infringed the plaintiff's patent.

A verdict was found for the plaintiff, subject to leave reserved to the defendant to move.

A rule nisi was accordingly obtained, and in Michaelmas Term, 1860, made absolute to enter a verdict for the defendant: see 9 C. B. N. S. 117 (E. C. L. R. vol. 99).

Upon appeal to the Exchequer Chamber, the judgment of the Court of Common Pleas was varied so far as to enter the verdict for the plaintiff on not guilty, but affirmed as to the rest: see 11 C. B. N. S. 471 (E. C. L. R. vol. 103).

The plaintiff then brought error to the House of Lords, where the case was argued by *Hindmarch*, Q. C. (with whom was *Bovill*, Q. C.), for the plaintiff, and by *Grove*, Q. C. (with whom was *Aston*), for the defendant.

The course of argument was substantially the same as in the courts below,—the following authorities being referred to:—

For the plaintiff: *Booth v. Kennard*, 1 Hurlst. & N. 527; *Steiner v. Heald*, 2 Car. & K. 1022 (E. C. L. R. vol. 61), 6 Exch. 607; *Seed v. Higgins*, 8 House of Lords Cases 550; *Hills v. The London Gas Light Company*, 5 Hurlst. & N. 312; *Betts v. Menzies*, 10 House of Lords Cases 117.

For the defendant: *Turner v. Winter*, 1 T. R. 602, 1 Webster's

P. C. 77; *Stevens v. Keating*, 2 Webster's P. C. 172, 2 Phill. 383; *Crane v. Price*, 4 M. & G. 580, 5 Scott N. R. 838, 1 Webster's P. C. 407; *The Patent Bottle Envelope Company v. Seymer*, 5 C. B. N. S. 164 (E. C. L. R. vol. 94); *Horton v. Mabon*, 12 C. B. N. S. 487 (E. C. L. R. vol. 104); *Brook v. Astor*, 8 Ellis & B. 478 (E. C. L. R. vol. 92); and *Hills v. The London Gas Light Company*, 5 Hurlst. & N. 812, and *Betts v. Menzies*, 10 House of Lords Cases 117 were distinguished.

LORD WESTBURY, C.—My Lords,—The questions which are raised by this appeal are subjects of some nicety, and it is therefore right that the grounds of your Lordships' judgment should be very distinctly stated. I will call your attention first to the issues raised on the record in the action below.

The first plea, of not guilty, raised the question of infringement of the plaintiff's patent. The second plea alleged that the plaintiff was not the true and first inventor of the supposed invention. The third issue was, that the invention in the declaration mentioned, and not disclaimed (that would be the invention as it stands in the amended specification) was not at the time of the making of the letters-patent a new invention. Those issues have all been found in favour of the plaintiff, and the findings are not sought to be disturbed by the defendant. The fourth issue amounts, when stated in a few words, to an allegation that the invention of the plaintiff has not been sufficiently and adequately described in the amended specification, that is, in the specification as it stands after the application of the disclaimer to the original specification. The fifth issue raises the question whether the disclaimer was warranted by the statute. That undoubtedly is, if not the most material, certainly one of the most material questions before the House. The sixth issue was, that the invention or the privilege secured by the letters-patent was not "any manner of new manufacture," within the meaning of those words contained in the Statute of James (21 Jac. 1, c. 3), as they have been subsequently construed by decisions.

Your Lordships, therefore, have to try three questions,—the sufficiency of the description contained in the amended specification,—the legality of the disclaimer,—and the fact whether the alleged invention is a new manufacture, within the statute.

Now, undoubtedly, the last issue is one which, if found in favour of the defendant, would almost supersede the necessity of considering the others: but, as there are independent issues upon these pleas, it will be requisite to consider all the three.

Before I come to these three questions, it is necessary, in order to render intelligible what I shall have to submit to your Lordships, that I should describe in as few words as I can the state of knowledge upon this subject antecedently to the plaintiff's patent, and what the plaintiff's patent appears to be, as it is found in the amended or corrected specification.

Antecedently to the plaintiff's patent, machines constructed of a roller revolving on a bowl were perfectly well known, as applied to the purpose of calendering, that is, to the purpose of giving a brilliant finish or gloss to the surface of any linen or cotton fabric, or fabrics composed partly of silk and partly of cotton. It was also found:

that the brilliant finish or gloss was greatly increased if gearing was applied to the machines so constructed, and the gearing was arranged in such a manner as to produce a differential velocity in the revolution of the roller and the revolution of the bowl; and that, if one bowl was made to revolve on the same roller at a greater amount of velocity, the effect was that a more perfect finish or more brilliant gloss was given to the face of the fabric. There was also known and used antecedently to the plaintiff's patent another machine which was similarly constructed, of an engraved roller and a bowl, and which was used for the purpose of impressing figures, patterns, or devices upon the surface of fabrics of the description I have mentioned. It also appears that attempts had been made to unite the two, that is, to use the machine for the purpose of impressing or engraving the pattern on the fabric, with a differential velocity, so as at once to effect the operation of giving a brilliant gloss and also to impress upon the fabric the proposed pattern or engraved surface that might be desired. But it had been found antecedently to the plaintiff's invention, that, if any figure or device was engraved upon the rollers for the purpose of impressing the device upon the fabric, and they were made to revolve with the differential velocity which I have mentioned, the edges of the engraving would tear the fabric, and the effect would be the destruction of the cloth that was submitted to that process. It is, however, most important to observe that the idea of producing a gloss by the differential velocity of the roller upon the bowl, and also the idea of using the same apparatus for the purpose of impressing a pattern or device on the fabric, were perfectly well known at the time of the plaintiff's patent.

Now, what the plaintiff appears to have done is this:—He discovered or found out, that, although rollers with a device or engraving upon them longitudinally, or around the circumference, would have the effect of tearing the fabric of the cloth, yet, if the engraving of the roller was limited to this, viz. making around the roller an infinite series of circular grooves of small diameter, it would have the effect of producing a particular pattern upon the cloth, and at the same time it might be worked with a differential velocity, so as to effect the two operations of giving a gloss to the cloth, and at the same time impressing upon it a pattern, viz. that pattern which would be produced by a small number of grooves or flutes, and that this might be done without injuring the fabric.

What, therefore, the plaintiff has done, has been, to take a particular pattern out of the infinite number of patterns that might be engraved upon the roller, and to use that particular pattern alone for the purpose of impressing the fabric of the cloth with that pattern, and also at the same time giving it a brilliant gloss or finish. And to that he has added what was also a well-known process, viz. that, if in the operation the cloth is fed into the machine in a particular way, viz. by a transverse motion, that appearance will be produced upon the cloth which is commonly denominated "watered," and which we see in watered silk,—a wavy character produced upon the surface of the cloth, which adds very much to its appearance and its value.

Before we can judge of the truth of the allegation that this is not a new manufacture, we must advert particularly to the original speci-

fication and to the plaintiff's disclaimer; because the question whether it is a new manufacture or not within the statute, must be determined upon the amended specification, that is, upon the specification reduced by the disclaimer.

It is quite clear that the original specification was utterly bad and void in law. It was expressed in such a way that the indentations, grooves, or flutings that were to be made upon the roller might be made, consistently with the language of the original specification, longitudinally, and not merely in a circular form around the roller. And it is quite clear upon the evidence that any longitudinal grooves or longitudinal patterns would not have the effect desired, but would be destructive of the fabric. Therefore, upon the face of the original specification, there was in reality no invention that could be maintained. And, upon examining the plaintiff's own evidence, which is clearly admissible upon all the questions before your Lordships, it is plain that the original specification contained no sufficient and correct description of any useful or valuable invention. The plaintiff appears to have been perfectly aware of that; and, accordingly, by his disclaimer, he has altered in a most material form the original specification.

The first point to which I would direct attention is this:—The original specification says that upon the roller which is directed to be employed, you may "groove, flute, engrave, mill, or otherwise indent upon it any desired design." Now, those words are so many verbs: "groove" is one; "flute" is another; "engrave" is another; "mill" is another; and "indent" is another: and the accusative case, the substantive which is governed by all those verbs, is "any desired design." According to the original specification, therefore, you might upon the roller,—not around the roller, but upon it,—in any form, spirally, or longitudinally, or in a circle, groove, or flute, or engrave, or mill, or otherwise indent any design that you desired. Now, it is clear, upon the plaintiff's own testimony, that, if you did so, you would produce a machine that would operate a destructive instead of a beneficial result.

In the amended specification, the plaintiff has struck out the material word "upon," and, instead of that, he has put the distinctive word "around" the roller; and he has altered the language so as to convert this general direction contained in the original specification into a specific direction to make grooves, flutes, or indentations around the roller. And, instead of the words being made to comprehend "any desired design," these words are entirely struck out; and the only direction now consists of a direction to make circular grooves around the roller.

It is quite obvious upon that, that the limits of the authority or license given to a patentee by the statute with respect to disclaimers, are here very much transgressed. The object of the act authorizing disclaimers (5 & 6 W. 4, c. 83) was plainly this, that, when you have in your specification a sufficient and good description of a useful invention, but that description is imperilled or hazarded by something being annexed to it which is capable of being severed, leaving the original description, in its integrity, good and sufficient without the necessity of addition, then you might by the operation of a dis-

claimant lop off the vicious matter, and leave the original invention, as described in the specification, untainted and uninjured by that vicious excess. But it never was intended that you should convert a bad specification, in the sense of its containing no description of any useful invention at all, into a good specification, by adding words that would convert what has been properly called in the court below "a barren and unprofitable generality," into a specific and definite and practicable description. It is quite clear, that, if that could be done, you would have an opportunity of introducing into a bad patent which contained no useful invention whatever, some discovery that might be developed by further experiment, and which was altogether unknown at the time of the original specification, and not at all included in the description contained in it.

But a further observation occurs upon this, that not only was it never intended by the statute that a patentee should take advantage of it for the purpose of converting a bad description into a good description, in this sense, or that, when the original description was wholly bad, and contained no new invention, it should be converted into a description containing a good invention. But the statute never contemplated that a patentee should have the power, under the form of a disclaimer, of making material additions to the original specification, so as by the aid of the corrected form of words and the additions so made to introduce into the specification an accurate and perfect description of an invention which you seek for in vain in the original specification.

But that is exactly what this patentee has done; for, after converting his general and impracticable description into a specific and definite direction, he goes on in the latter part of his specification to introduce this most extraordinary and most important addition:—He says,—“If the grooves, flutes, or indentations around the roller are as numerous as the warp-threads in the fabric to be operated upon, or nearly so; or, if the fabric has already passed through between the roller and the bowl, and the fabric has slight transverse motion given to it when fed into the machine, an indefinite number of watering patterns may be given to the fabric at one operation or passage.” And then he goes on to describe the way in which the peculiar watering effect which is called in the trade by the name of “moiré antique” may be produced. It would be impossible, therefore, for any one to say,—“I find in the original description that which is now brought out and accurately expressed in the amended specification.” Unless that can be done, the limits given by the statute have, I submit to your Lordships, been clearly transgressed.

If that be so, your Lordships, I think, will have no difficulty whatever in concurring with the court below in the conclusion that this is an extravagant use of the power of disclaimer, and much beyond the license or authority given by the statute. I believe it will be found that that license or authority consists only in the power of rejecting. It may sometimes happen, that, when something is cut out, some few slight alterations may be required to render intelligible that which remains, and to that extent there would be authority by the statute to make a slight addition; but certainly there is no authority to alter a barren generality into a specific practical description, or to convert

that which upon the description is not applicable to any one definite form, into a description applicable to a specific and definite mode of proceeding.

Adverting again to what I began with calling your Lordships' attention to, the question is, whether this description contained in the amended specification is or is not a description of anything which comes within the words "new manufacture," as contained in the statute of James. It is necessary for that purpose to call your Lordships' attention to the fact, that, not only did the disclaimer do what I have already described to your Lordships, but it went further, and became the original title of this patent: that title had been,— "Improvements in embossing and finishing woven fabrics, and in the machinery or apparatus employed therein." The patentee has deliberately by the disclaimer struck out the last words, and has therefore deliberately reduced his patent to a patent for "Improvements in embossing and finishing woven fabrics." And the question is, whether, so regarded, taking in your hand (with the knowledge that existed at the time) this description contained in the specification, as corrected by the disclaimer, does it amount to a new manufacture?

I should have thought that the patentee might have maintained a patent for a new combination, if he had put his invention upon this ground, that he was the first person who discovered that the circular grooved roller would answer by one process the double purpose of calendering and imprinting the fabric; and that he was the first person who had constructed a machine that was capable, without injury to the fabric, of effecting together both those operations. If, therefore, the original title had remained, and had not been studiously disclaimed, I myself should have thought it very difficult to resist the conclusion that the patent was capable of being supported as a new manufacture, under this view, that it really did describe for the first time a new combination of machinery. Your Lordships are well aware, that, by the large interpretation given to the word "manufacture," it not only comprehends productions, but it also comprehends the means of producing them. Therefore, in addition to the thing produced, it will comprehend a new machine or a new combination of machinery: it will comprehend a new process, or an improvement of an old process. But, if we look at this patent, and inquire whether there is an improvement in embossing or finishing woven fabrics contained in this amended specification, I am bound to say, that, having regard to existing knowledge at the time, I think there is no such improvement as amounts to a new manufacture, because this mode of producing a brilliant gloss upon the surface was perfectly well known. Therefore, that woven fabrics might be finished according to one or the other of those two processes, was perfectly well known. I cannot, therefore, having regard to the reduced specification which the patentee has now made to constitute the description of his invention, say that there is in it any new process entitling it to the denomination of a "new manufacture." This is a matter, no doubt, of much delicacy; and it is a matter upon which unfortunately we are without any aid from the judgment of the court below; for, I do not find that, either in the Court of Common Pleas, or in the Court

of Exchequer Chamber, any one of the judges gave any opinion upon this point. The general verdict which was entered for the plaintiff upon the trial, has been converted upon this particular issue into a verdict for the defendant. I cannot say that my mind is free from doubt upon the subject: but, having regard, as I have already observed, to the operation of the disclaimer, and being of opinion that the specification as amended is a description, not of a machine, not of a new combination of machinery, but of a new process, I think there is nothing entitled to the character of a "new manufacture" to be found in that specification.

My Lords, for the reasons I have already given, I concur entirely with the court below in holding that the disclaimer very much exceeds the limits of the authority given by the statute; and upon that point, therefore, I think the appellant (the plaintiff below) has entirely failed, and that it would be a very mischievous use of the power of disclaimer given by the statute, if your Lordships were to allow of its being used in the manner desired by this patentee, which would in truth confound all inventions, and you would be unable to ascertain whether the thing introduced by the amendment was or was not known to the patentee at the time when he made the original specification.

There remains the fourth issue, viz., the question of the sufficiency of the description. Upon that point it was contended strongly on the part of the defendant, that the description contained in the amended specification was insufficient; and he insisted very much upon this, that the direction to make indentations or grooves around the roller was given in such a manner that it would include spiral grooves as well as circular grooves; and that, if you admit that it would include spiral grooves, it follows that there is no limit to the spirality,—if I may adopt such a word; that therefore it would be possible to extend the groove until it became almost like a longitudinal indentation; and that, in that shape, undoubtedly it must by the evidence be admitted to be not a valuable invention.

I think the answer to that argument is the language of the plaintiff's disclaimer. The disclaimer expressly repudiates any description of groove but a circular groove. That disclaimer is by the statute made part of the specification; and therefore I read the amended specification as containing a direction to cut round the roller circular grooves only, and not as including spiral grooves. It appears, in fact, that the grooves used by the defendant are spiral grooves; but that in truth the spirals are so minute, so numerous, and so closely approximating to circular grooves, that, according to the evidence, the difference is not discernible by the eye; and accordingly it has been held that they did substantially amount to an infringement of the plaintiff's patent.

The learned counsel for the defendant then insisted that the language of the claim was wider than the direction, and that the claim would include spiral grooves, even if they were not included in the description. I cannot accept that mode of interpreting the specification. If there be a distinct direction given in an earlier part of the specification, to cut circular grooves only, and then if there be in a subsequent part of the specification a general reference to grooved rollers, I think your Lordships must take that to mean rollers grooved

in the manner already specified, and that it would be unfair and unreasonable to take those words as indicating more than what has been expressly directed.

There were some objections raised to the specification, and particularly with regard to the uncertainty of the material, the language of the amended specification being that the plaintiff took "a roller of hard metal or other suitable material." I do not think those words "or other suitable material" contain anything like such a generality of direction as would be fatal to the patent: "other suitable material," no doubt, would mean any material equally sufficient for the purpose with hard metal. I think your Lordships would be of opinion that there was no solid weight in that objection.

I believe these were the principal objections that were urged by the counsel for the defendant to the sufficiency of the description.

I think those objections were without weight; and I must therefore advise your Lordships to concur with me that the court below was wrong in directing a verdict to be entered for the defendant upon the fourth plea, on the ground of the description being uncertain and insufficient: and I think your Lordships will be of opinion, that, if there is no other objection to the amended specification, it is not properly open to be set aside upon the ground of uncertainty.

These observations comprehend, I think, the whole of the subject upon which the House has to determine. I should advise your Lordships, therefore, to reverse the decision of the court below so far as relates to the fourth issue, but to affirm the judgment of the court below so far as relates to the illegality, that is to say, the unauthorized character of the disclaimer; and also to affirm the conclusion of the court below so far as it affirms the proposition that the alleged invention described in the amended specification is not, having regard to the disclaimer, a "new manufacture" within the meaning of those words contained in the Statute of James.

The result will be, that the appellant (the plaintiff below) will succeed so far as relates to the fourth issue, but will fail with regard to the other issues, viz., the fifth and the sixth.

LORD CRANWORTH.—My Lords,—By far the most material question in this case is as to the issue which is raised on the sixth plea. Now, as to that, I confess I entertain no doubt whatever of the correctness of the Lord Chancellor's opinion, viz., that the amended specification does not disclose anything that can, under the most liberal interpretation of the words, be deemed a "new manufacture." The evidence shows (indeed, there was no question or controversy upon that subject), that, long before this patent, the use of rollers was perfectly well known for the two objects of calendering and impressing patterns. For the purpose of calendering, the roller and the bowl (which is but another species of roller) were made always to revolve at unequal velocities; the result of which was to give the glaze or polished surface which we see in calendered cottons. The mode in which the pattern was impressed was by a roller and a bowl, the same as in the calendering process, except that it was necessary in that case that the roller and the bowl should revolve at *equal* velocities, because, otherwise (as was clearly explained), if there was a pattern that went at all across the roller, it would tear the cloth; and therefore it became im-

possible to use the roller with the bowl for that purpose, if they were revolving at *unequal* velocities. However, the use of the roller and the bowl for calendering, and of the roller and the bowl for impressing the patterns, was perfectly well known; and the use of the roller and the bowl going at equal velocities and at unequal velocities was also perfectly well known; and manufacturers were right in supposing that, ordinarily speaking, you cannot cause the roller and the bowl to revolve at unequal velocities so as to impress the pattern, because it would cause destruction to the fabric. But, what this patentee discovered (and I think it was a very useful discovery), was, that there was one particular sort of pattern which might be impressed upon the roller, and made to revolve,—the fabric being passed between the roller and the bowl,—at an *unequal* velocity, without tearing. But I quite agree with what was said by Mr. Grove, and it could not possibly be disputed by any gentleman at the Bar, that it is not every useful discovery that can be made the subject of a patent, but you must show that the discovery can be brought within a fair extension of the words a “new manufacture.” Now, how is this possibly to be called a “new manufacture?” I, as a manufacturer, have my roller, which I am in the habit of rolling upon a bowl (if that is the proper expression); the fabric passing between the two moving at equal velocities. Then, I can impress my pattern upon it. I have my roller without any pattern engraved upon it: I can cause that and the bowl to revolve at unequal velocities, and it will calender. But I do not do them both,—that is the calendering process and the embossing,—at the same time, because I suppose that in so doing I shall tear my fabric; and I rightly so suppose, until the plaintiff makes the discovery that there is one particular sort of pattern which may be produced without tearing the fabric. Now, that is a very useful discovery: but it would be strange to say that it is a “new manufacture,” and that therefore I am to be deprived of the most useful way of employing my roller. There is nothing new in the invention, that, by a particular use of it, I shall obtain a result which I did not before know that I could obtain.

The Lord Chancellor has pointed out that, in the original specification, there was a claim for the machinery or apparatus employed. No doubt, the plaintiff thought that perhaps he could sustain such a claim; but he very properly, I think, disclaimed it; not that I think that, if he had retained it, it would have made any difference, because, although improved machinery for this purpose would be a legitimate subject of a patent, the evidence would have failed him there, for there is no evidence to show that there was any new machinery. Therefore I think it is perfectly clear that on the sixth plea, which is the most important of all the pleas, the verdict was very properly entered by the court below for the defendant.

So, again, with regard to the fifth plea, I think the verdict was rightly entered for the defendant. With regard to the fifth plea, I shall not go over again the ground which the Lord Chancellor has gone over. It is quite clear that the object of a disclaimer cannot be to create any new right not included in the original specification. It cannot be (as it is called) to extend the specification. What the plaintiff here has done is this:—He has filed a specification which I may

say is in this sort of algebraical form,—“My specification consists of A., B., C., D., and all the letters of the alphabet, and any combination of all the letters of the alphabet.” But it turns out that nothing will really meet his case but the combination of F. and Z. together. Now, no doubt, when he had said,—“I claim a combination of all the letters of the alphabet,” a combination of F. and Z. would be included: but it would be trifling with the knowledge of mankind to say that that sort of specification would communicate anything. It is true, that, by trying and puzzling over all possible combinations, you might have found out the particular combination upon which alone the plaintiff could have relied: but that is not what the words would properly mean, and not what any authority warrants you in taking as their proper meaning. The distinction was very clearly pointed out in the case of *Seed v. Higgins*, before this House,—8 House of Lords Cases 550,—that you may disclaim something which leaves untouched a description which is in itself perfect; but that, where you have an imperfect description, you cannot say because it is (according to the language of one of the cases) a mere impracticable generality, “I exclude everything except one single case, which, though involved in it, could not by any reasonable investigation have been discovered by an ordinary person.” I think, therefore, with the Lord Chancellor, that, upon the fifth plea also, the judgment of the court below was perfectly right.

My Lords,—I wish to make one observation with regard to a remark which fell from the Lord Chancellor. His Lordship said that he did not think that this part of the case, upon the sixth plea, had been adverted to in the court below. I think that is a mistake. I observe at the end of the judgment of Lord Chief Justice Erle, he says,—“We also observe that a patent for the exclusive right to one particular use of a known machine might be objected to, although the patentee may have discovered how to use the machine more beneficially than the owner knew.” I think it is apparent that Chief Justice Erle was there adverting to the sixth plea.

With regard to the fourth plea, I am not at all prepared to differ from the Lord Chancellor, though I confess I have had my doubts whether the court below was not right upon that also, viz., upon the question of what had been termed (we have manufactured a word for the occasion) “spirality.” At the same time, I think, by fair interpretation, we may take it that the new indentations which were described were intended to be circular; and, in that case, I think the specification as amended, would be a good specification. Therefore, I concur with the Lord Chancellor in thinking, that, upon that plea, we ought to reverse the judgment below, and direct a verdict to be entered for the plaintiff.

LORD CHELMSFORD.—My Lords,—I agree with my two noble and learned friends that the verdict ought to be entered for the plaintiff upon the fourth plea, and for the defendant upon the fifth and sixth pleas.

With respect to the fourth plea, which raises the question of the sufficiency of the specification as it stands after the disclaimer, I agree entirely with my noble and learned friend on the Woolsack, and

concur in the reasons which he has given for his opinion in this respect, to which I have nothing to add.

The question raised by the fifth plea is, whether the disclaimer extended the exclusive right granted to the plaintiff by the letters-patent. It seems clear that the word "extend," in the 5 & 6 W. 4, c. 83, cannot be used only in its ordinary sense of "adding to" or "enlarging," because the exact meaning of the term "disclaimer" to which it is applied, is, the renunciation of some previous claim actually or apparently made, or supposed to be made. It must therefore be intended to comprehend a case where the disclaimer would give the patentee a right which he could not have enjoyed under the specification as originally framed. Here, the specification was conceived in general terms, embracing an indefinite variety of modes of indenting upon all descriptions of rollers any desired design. The plaintiff afterwards discovered that no other rollers but those which had circular grooves, flutings, or indentations around their surfaces would answer; and he therefore by his disclaimer limited his invention to this description of roller only. Now, as these were not specifically described in the original specification, but were merely involved in the general terms which were used, the plaintiff had not complied with the condition of the letters-patent, in particularly describing and ascertaining the nature of his invention. When, therefore, by his disclaimer, he confines his claim to circular grooved rollers as his sole invention, though in one sense he may be said to narrow a right, yet he really extends it, because he thereby describes his alleged invention sufficiently to enable him now to assert a right under the patent which he never could have successfully maintained upon the original specification alone. Upon this short ground, and looking merely to the specification and the disclaimer, without referring to the evidence, I have come to the conclusion that the defendant is entitled to have the verdict entered for him on the fifth plea.

The sixth plea raises the question whether the plaintiff's supposed invention, or rather his discovery, is the proper subject of a patent. The claim made in the specification, as amended by the disclaimer, is, for the invention of a process by which, by means of rollers and bowls, the rollers having grooves, flutes, or indentations around them, and revolving with greater velocity than the bowls, the embossing of patterns on fabrics and adding a finish or lustre to them may be effected by one single operation. Before the patent, an engraved roller and a bowl had been used, with equal surface speed, for embossing. For the process of calendering, two rollers, or a roller and a bowl, had been employed, having different surface speeds; and circular grooves for embossing had also been in use. There was, therefore, nothing new in the process of embossing with pattern-rollers, and nothing new in giving a differential speed to the roller and the bowl for the purpose of producing a gloss or finish, nor in the employment of circular grooves. But the plaintiff conceived the idea that the same machine, by means of gearing communicating motion from the roller to the bowl, could be made to produce any kind of pattern, and give a finish to certain fabrics, by one and the same operation. After he had taken out his patent, he found that his general notion was erroneous, and that only one description of rollers viz., those with circular

grooves, could be successfully employed, and he therefore by a disclaimer limited his claim to this single application of the machine. What invention was there in all this? The plaintiff does not claim to have invented any new combination of machinery, although by part of the title of his patent, which he afterwards disclaimed, he appears originally to have considered that he was an inventor in this sense: nor has he introduced to the world any new process: but the utmost that he can lay claim to, is, that he has discovered that by giving a differential motion to different parts of an old machine, a power existing in it might be developed and brought into action. It appears to me that such a discovery is not the subject of a patent, and that therefore the defendant is entitled to a verdict upon the sixth plea also.

The result will be, that the decision of the court below upon the fourth issue is reversed, and a verdict entered thereon for the plaintiff; and that the decision of the court below on the fifth and sixth issues is affirmed.

Judgment accordingly.

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ARBITRAMENT.

Conduct of Reference.

1. A lease contained a proviso, that in case any disputes and differences should arise between the parties, they should be referred to two arbitrators, one to be chosen by each party, and that, if either of them should neglect to name an arbitrator on his part within seven days after notice of the appointment of an arbitrator by the other, the arbitrator so appointed should act for both: and it was further agreed that "the submission of the said parties to the award of the said arbitrators or arbitrator might at the instance of either party be made a rule of court." Disputes having arisen, the lessor appointed an arbitrator in writing, and gave notice in writing to the lessee that he had done so: the latter did not appoint an arbitrator on his part; whereupon, after due notice, the arbitrator appointed by the lessor proceeded ex parte, and made an award:—Held, upon the construction of the 17th section of the Common Law Procedure Act, 1854, that, upon filing the appointment, with an affidavit by the lessor verifying his signature thereto, the submission might be made a rule of court. *In re Newton and Hetherington*, 342.

2. Held also, that, by the combined effect of the 17th and 26th sections, an affidavit by the attesting-witness to the lease was not necessary. *Ib.*

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BANKING COMPANY.*Construction of deed of settlement.*

Negligence of officer.—The declaration in an action against the manager of a banking company, after alleging the retainer and employment of the defendant and the nature of his duties as manager, stated, amongst other things, that he "did not nor would take due and proper care not to advance the money of the company to persons of doubtful, insufficient, or bad means or credit, or on doubtful, insufficient, or bad securities, or to discount bad or forged bills and notes; and negligently and improperly advanced the money of the company to persons of doubtful, insufficient, and bad means and credit, and on doubtful, insufficient, and bad securities, and discounted and renewed bad and forged bills and notes, and wholly neglected to take due and proper care or to use or employ due and proper skill and diligence in and about the management of the affairs of the bank and the discharge of the duties of manager as aforesaid."

Plea to so much of the breach as above set out, that the deed of settlement of the company contained a clause, which provided, amongst other things, that "none of the directors, trustees or other officers should be answerable or accountable for the insufficiency or deficiency of any security or fund in or upon which the moneys of the company might be placed out or invested or for any loss, damage, or misfortune which might happen to the moneys, funds, effects, or property of the company, unless the same should happen in consequence of the wilful neglect or default respectively of such director, trustee, or other officer of the company;" that the defendant was the manager and an officer of the said company within the meaning of the said deed of settlement, and was employed as such upon the terms of the said last-mentioned clause; and that the said alleged breaches to which the plea was pleaded did not happen by reason or in consequence of the wilful neglect or default of the defendant as such manager as aforesaid:—

Held, that the plea was a good answer as to so much of the breach to which it was pleaded. *Ward v. Greenland*, 527.

BANKRUPT.*Deed of arrangement, under the 24 & 25 Vict. c. 134, s. 192.*

1. By a deed of arrangement under s. 192 of the Bankruptcy Act, 1861, purporting to be made between the debtor of the first part, and the several executing creditors, on behalf of themselves and all and every other the creditors who might assent to or become bound by the deed, of the second part, the debtor covenanted to pay all his creditors the amount of their respective debts by nine monthly instalments, and the parties of the second part agreed to accept such instalments, and covenanted, that, "while the said instalments were duly and regularly paid by the debtor, they would not sue him or enforce any judgment or other proceedings against him or his estate:"—Held, that this amounted only to a covenant not to sue for a limited time, and was not pleadable in bar as a release. *Ray v. Jones*, 416.

Deed of inspectorship under 24 & 25 Vict. c. 134, s. 192.

2. *Execution under s. 198.*—After action brought, the defendant executed a deed of inspectorship under s. 192 of the Bankruptcy Act, 1861, which was duly filed, &c., before judgment signed. Execution was afterwards issued, and the defendant's goods taken:—Held, that the execution so issued could not be made available without the leave of the court under s. 198, notwithstanding the defendant might have pleaded the deed. *Hartley v. Mare*, 85.

Composition-deed under 24 & 25 Vict. c. 134, s. 192.

3. *Verification of debts.*—A stipulation in a composition deed under the 192d section of the Bankruptcy Act, 1861, that it shall be lawful for the trustees to require any person or persons claiming to be a creditor or creditors of the debtor to verify the nature and amount of such debt or claim, with full particulars showing the consideration thereof, by statutory declaration before the commissioners of bankruptcy, or otherwise, as the said trustee or trustees may think fit,—is unreasonable, and renders the deed inoperative as against a non-assenting creditor. *The Brompton, Chatham, Gillingham, and Rochester Waterworks Company v. Jennings*, 149.

4. By a composition deed under the 192d section of the Bankruptcy Act, 1861, the debtor and the defendants as his sureties jointly and severally covenanted with the plaintiff as trustee for the creditors, to pay to him so much as would suffice to pay a composition

BANKRUPT.

Composition-deed under 24 & 25 Vict. c. 134, s. 192 (continued).

of 7s. 6d. in the pound to all the creditors, by three instalments of 2s. 6d. each, at four, eight, and twelve months: and the deed contained a proviso, that, "in case default should be made in payment of any or either of the said instalments, or in case before the said composition should be fully paid to the trustee, the debtor should be adjudicated bankrupt, or make or attempt to make any assignment of his estate for the benefit of his creditors, or any arrangement with his creditors different to that arrangement, then and in every such cases those presents, and the release, and every other clause and provision therein contained, should be thenceforth at an end and void." In an action against the sureties to recover the second instalment,—the principal debtor having been adjudicated bankrupt on his own petition:—Held, that the bankruptcy did not render the deed void as against the sureties, but that the proviso made it voidable, at the election of the creditors. *Hughes v. Palmer*, 393.

5. By whom the election in such a case was to be exercised,—*quære?* *Ib.*

6. A composition deed under the 192d section of the Bankruptcy Act, 1861, professing to be made between the debtor, a surety, and all the creditors (whether assenting or bound under the statute), recited, amongst other things, that the debtor had agreed to pay his creditors 5s. in the pound upon their debts by two instalments of 2s. 6d. in the pound each, the first in cash, the second by the joint and several promissory notes of the debtor and the surety, at four months' date; and that the statutory majority of creditors had consented to accept such composition. It then witnessed, that, in consideration of the premises, the several creditors released the debtor (in the largest possible terms) from all debts, claims, and demands, "save and except their rights, claims, and demands under and by virtue of this deed, and of the said promissory notes for the second instalment of the said composition;" with a proviso saving their remedies against third persons: and the surety covenanted not to accept any security, preference, or benefit, until the full amount of the composition should have been paid:—Held, that the deed amounted to an absolute release, and might be pleaded in bar as such. *Lay v. Mottram*, 479.

Surrender of lease, under 12 & 13 Vict. c. 106, s. 145.

7. A plea, under the 145th section of the Bankrupt Law Consolidation Act, 1849, to an action for breaches of covenants in a lease,—that the defendant (the lessee) became bankrupt, that the assignees declined to take the lease, and that, within fourteen days after notice thereof, the defendant executed a surrender (under seal) of the demised premises to the lessors, and tendered to them such surrender, and offered to deliver up the possession of the premises to them,—is bad, for not showing the impossibility of a literal compliance with the conditions of the section; as, that the lease was lost or destroyed, or the like.

Colles v. Egan, 372.

Rights and liabilities of assignees.

8. An official assignee of a district court of bankruptcy having given his assent to the bringing of an action in his name jointly with that of the trade-assignee for the recovery of part of the bankrupt's estate, and, the action proving unsuccessful, the trade-assignee having paid the costs:—Held,—affirming the judgment of the court below,—that the latter was entitled to sue the official assignee for contribution. *Bevan v. Whitmore*, 763.

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BILL OF EXCHANGE.

Form of.

Held, that an instrument in the following form,—“Four months after date pay to my order the sum of three hundred pounds, for value received,” addressed to and formally accepted by the defendant, but having no date and no drawer's name,—was neither a bill of exchange nor a promissory note. *McCall v. Taylor*, 301.

BROKER.

Who a broker within the 57 G. 3, c. 60.

Dealing in shares.—The dealing in or buying and selling for reward of shares in English or foreign joint stock banks or companies, or the debt, stock, or securities of foreign governments, is an acting and assuming to act as a broker, within the 57 G. 3, c. 60. *Scott v. Jackson*, 134.

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Construction of.

1. The ship A., insured in a club (of which the defendants were managers) by one of the conditions of which it was provided, that, "in case of damage or loss by contact which any ship in this association may do to others, this society shall be liable to contribute its proportion, but not beyond the sum insured, and also law costs given in any suit or action defended by the previous consent in writing of the managers upon this policy," ran into and damaged the plaintiffs' ship B. The owners of the injured vessel caused the ship A. to be arrested under process from the Admiralty Court; whereupon her owner and the defendants, in order to procure her release, agreed with the owners that they or one of them would pay them "the amount of damage which the said ship B. has received from the said collision, and also the costs of the proceedings in the Court of Admiralty against the ship,"—to be ascertained, in case of dispute, by Mr. Richards, the average-stater :—Held, that "the ship B." meant "the owners of the ship B." *Heard v. Helman*, 1.

2. A contract for the sale of cotton of a given quality is not performed on the part of the seller, by a tender of a larger quantity, out of which the buyer is required to select those bales which answer the description of the cotton contracted for. *Rylands v. Kreitman*, 351.

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CONVERSION.

Joinder of counts for conversion and detention of goods.

A count for the conversion and a count for the detention of goods ought not to be allowed, unless a judge at Chambers is satisfied that substantial justice requires that they should be joined. *Mockford v. Taylor*, 209.

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Appeal from.

1. No appeal lies to this court from the county-court, in respect of an order made in exercise of its powers in a winding-up proceeding under the 17th section of the Industrial and Provident Societies Act, 1862, 25 & 26 Vict. c. 87. *Henderson, app., Bamber, resp.*, 540.

COVENANT.

Effect of recitals in a deed.

A recital in a deed may amount to a covenant, where it appears to be the intention of the parties that it should do so. *Lay v. Mottram*, 479.

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[CROWN GRANT.

Validity and effect of.

1. The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is by law vested in the Crown: but this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from or interfere with the right of navigation which belongs by law to all the subjects of the realm.

If, therefore, the Crown grants part of the bed or soil of a navigable river or an estuary, the grantee takes it subject to the public right, and cannot in respect of his ownership of the soil claim anything which interferes with the enjoyment of the public right.

2. Anterior to Magna Charta (by which such grants were prohibited), a several fishery in an arm of the sea or navigable river might have been granted by the Crown to a subject; and the grant might include a portion of the soil for the purpose of the fishery. But this, like every other grant, whenever made, must have been subject to the public right of navigation.

Where, therefore, the plaintiffs claimed to be entitled by Royal grant to a portion of the bed and soil (below low-water mark) of the arm of the sea which forms the estuary of the river Thames opposite to the manor of Whitstable, in the open sea-way, being the high road for the passage of vessels, and claimed, as an immemorial payment due to the lords of the manor, a sum of 1s. for every vessel which cast anchor within the precincts of that part of the bed or soil of the river within the manor which was claimed by them:—Held, that, inasmuch as this claim interfered with the right to anchor, which is a necessary part of the right of navigation, subject to which the original grant must be taken to have been made,—it could not be supported on the ground of ownership of the soil.

3. If such payment be claimed as an ancient anchorage-due, some facts must be shown which prove, or from which it may be inferred, that the soil was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered to the public, in respect of which the alleged grant was made: but no such presumption can be made or inference drawn from the mere fact of an immemorial payment. *The Company of Free Fishers and Dredgers of Whitstable v. Gann*, 803.]

DAMAGES.

Measure of, in action for breach of contract.

The ship A., insured in a club (of which the defendants were managers) by one of the conditions of which it was provided, that, "in case of damage or loss by contact which any ship in this association may do to others, this society shall be liable to contribute its proportion, but not beyond the sum insured, and also law costs given in any suit or action defended by the previous consent in writing of the managers upon this policy," ran into and damaged the plaintiff's ship B. The owners of the injured vessel caused the ship A. to be arrested under process from the Admiralty Court; whereupon her owner and the defendants, in order to procure her release, agreed with the owners that they or one of them would pay them "the amount of damage which the said ship B. has received from the said collision, and also the costs of the proceedings in the Court of Admiralty against the ship,"—to be ascertained, in case of dispute, by Mr. Richards, the average-stater:—

Held, that "the ship B." meant "the owners of the ship B.," and that the plaintiffs were entitled to recover the same measure of damages under the agreement that they would have been entitled to in the proceedings in the Admiralty Court, viz. the expenses of repairing their vessel, the costs incurred in the arrest and detention of the A., and the loss of freight during the time the B.'s repairs were going on. *Heard v. Holman*, 1.

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DETINUE.

Joinder of counts for conversion and detention of goods.

A count for the conversion and a count for the detention of goods ought not to be allowed, unless a judge at chambers is satisfied that substantial justice requires that they should be joined. *Mockford v. Taylor*, 209.

DEVISE.*Construction of.*

Estate vested.—A testator by his will devised certain real estates to his daughter Harriett for life, and after her death to her sons successively in tail, and, in default of such issue, to his son John Arthur in fee. By a codicil, the testator, after reciting that "he had by his will devised the reversion in fee in several estates, expectant on the decease of his several daughters (including Harriett), to his son John Arthur," and that "he had devised other estates to trustees to the use of his said son until he should attain the age of twenty-five years, and thereupon to him and his assigns for ever," declared his will to be, "that, in case his said son should happen to depart this life without leaving lawful issue of his body living at his decease, and before the said several estates should become vested in him by virtue of the said several limitations aforesaid," the said estates should go to such of his daughters as should then be living, and to the issue of such of them as should then be dead, in the manner therein mentioned.

The testator died in 1804: John Arthur attained twenty-five, and died in 1844, without having had issue: and the testator's daughter Harriett died unmarried in 1864.

Held, that "vested," in the codicil, meant "vested in interest," and consequently that, on the death of the testator, the estates vested immediately in the son John Arthur, subject to the estates limited to the daughter Harriett and her issue, and that the devisees of John Arthur took. *Richardson v. Power*, 780.

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ERROR.*Error in fact.*

It is no ground of error in fact, that the whole of the special jurors struck were not summoned, or that the special jury panel was called over and a tales prayed before 10 A. M., the time for which the special jurors were summoned,—it not being competent to the party to aver anything that is inconsistent with the record. *Irwin v. Sir G. Grey, Bart.*, 585. [Affirmed on error in Cam. Scacc. M. Vac. 1865.]

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FALSE REPRESENTATION.*On the sale of a public-house.*

1. The plaintiff bought of the defendant "the household furniture, fixtures, utensils in trade," &c., of a public-house, "as per inventory taken by W. W.," for 262*l.*, upon a representation by the defendant that the receipts of the house were 80*l.* per month, which representation turned out to be false. In an action for this misrepresentation, the declaration alleged the agreement to be for the purchase of the goodwill, furniture, fixtures, &c.:—Held, that the declaration substantially stated the true nature of the agreement, and that, at all events, the court would, if necessary, amend it. *Oater v. Wood*, 286.

FELLOW-WORKMAN,—See **MASTER AND SERVANT**.

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GAME,—See **SHOOTING**.

GAMING.*Betting-houses under 16 & 17 Vict. c. 119.*

Held by the Exchequer Chamber,—reversing the judgment of the Common Pleas,—that the habitual use of a spot in a public park for the receiving of deposits, to return a larger sum on the contingency of a particular horse winning a race, is not the using of a "place" for such purpose, within the 16 & 17 Vict. c. 119, s. 1. *Doggett v. Cuttens*, 766.

GENERAL AVERAGE,—See **SHIPPING**, 3, 4.

GOODWILL,—See **FALSE REPRESENTATION**. **RAILWAY COMPANY**.

GUARANTEE.*Construction of.*

A. agreed to do for B. & Co. all the wood-work on an iron ship which B. & Co. were building for M. & Co., according to a certain tender, the whole to be completed for 3800*l*. The contract or tender contained the following clause,—“Any *important* work not mentioned in this tender that may be required to be done by *the owners*, to be paid for by them, in addition to the amount herein specified.” The work was undertaken by A. for B. & Co. upon the faith of a guarantee by C., as follows,—“In consideration of your contracting with Messrs. B. & Co. for the wood-work of an iron ship now building by them for Messrs. M. & Co., we hereby guarantee the payment to you *according to the contract*.” The word “important” in the contract was inserted by A., with the consent of B. & Co., after the guarantee was signed by C. :—

Held, that the contract bound B. & Co. for extra work done, they being the persons referred to as “the owners;” and that the insertion of the word “important” had no material effect upon the liability of C. under the guarantee. *Andrews v. Lawrence*, 768.

[Affirmed in the Exchequer Chamber, 778.]

GUNPOWDER.

Damage from explosion of,—See **INSURANCE**.

HARBOUR-DUES,—See **SHIPPING**, 1.

HIGHWAY.

Obstruction of,—See **RAILWAY COMPANY**.

HIGHWAYS.

Appointment and removal of surveyor.

Surveyor's accounts.]—A.'s year of office as surveyor of highways in the township of D. expired on the 25th of March, 1863, when B. was appointed his successor, pursuant to the 5 & 6 W. 4, c. 50, and at the next special sessions (on the 1st of April) A. verified and passed his accounts, which showed a balance of 24*l*. 6*s*. 5*d*. in his hands due to the township. At this time there were debts owing by A. as such surveyor. On the 10th of April, a highway board was formed (under the 25 & 26 Vict. c. 61) for a district which included the township of D. : and on the 4th of May the board appointed a district-surveyor. B. never acted as surveyor at all :—Held,—upon the construction of the 5 & 6 W. 4, c. 50, ss. 42, 43, and 25 & 26 Vict. c. 61, ss. 11, 43,—that A. was an “outgoing-surveyor,” and as such liable to account to the board ; but that he was entitled to the same allowances for disbursements, &c., from the board as he would have been entitled to if he had paid over the balance to his immediate successor in office, B. *Wrexham Highway Board, app., Hardcastle, resp.*, 177.

HUSBAND AND WIFE.

Joinder of causes of action.

1. Since the Common Law Procedure Act, 1852, s. 40, a count for breaking and entering the premises of *the husband* may be joined with a count by the *husband and wife* for assaulting and imprisoning the wife. *Morris v. Moore*, 359.

Acknowledgments by married women.

2. *Affidavits.*]—The rule of Michaelmas Term, 1862, as to the form of affidavits on acknowledgments taken under the statute 3 & 4 W. 4, c. 74, is directory only. *Ex parte Eliza Hall*, 369.

3. *In re Cooper*, 18 C. B. N. S. 220, confirmed. *Ib.*

Conveyance of the wife's separate property, under 3 & 4 W. 4, c. 74, s. 91.

4. An order for the conveyance of property by a married woman, under the 3 & 4 W. 4, c. 74, s. 91, will only be made with reference to a contemplated purchase. *In re Mary Graham*, 370.

5. Conveyance of separate property by married woman, where living apart by sentence of judicial separation, without alimony, &c. *Ex parte Susannah Andrews*, 371.

INDUSTRIAL SOCIETIES.

Winding up, under 25 & 26 Vict. c. 87.

1. No appeal lies to this court from the county-court, in respect of an order made in exercise of its powers in a winding-up proceeding under the 17th section of the Industrial and Provident Societies Act, 1862, 25 & 26 Vict. c. 87. *Henderson, app., Bamber, resp.*, 540.

2. Whether the county-court, under the authority conferred upon it by that statute, has power to make an order restraining proceedings in the Liverpool Passage Court against a member of an industrial society registered under the 25 & 26 Vict. c. 89, which is being wound up in the county-court by virtue of the jurisdiction conferred upon it by the 25 & 26 Vict. c. 87, s. 17,—*quære ? Ib.*

INJURIOUS AFFECTION,—See **RAILWAY COMPANY**.

INSPECTORSHIP.

Deed of,—See **BANKRUPT**, 2.

INSURANCE.

Fire insurance.

Explosion.]—By the terms of a policy premises were insured against “such loss or damage as should or might be occasioned by fire to the property therein mentioned:”—

Held, that this did not cover damage resulting from the disturbance of the atmosphere by the explosion of a gunpowder magazine a mile distant from the premises insured. *Keerott v. The London Assurance*, 126.

JETTISON,—See **SHIPPING**, 4.

JOINT-STOCK BANK.

Shares in,—See **BROKER**.

JOINT-STOCK COMPANY.

Shares in,—See **BROKER**.

JUDICIAL SEPARATION,—See **HUSBAND AND WIFE**, 5.

JURY.

Special,—See **ERROR**.

LANDS CLAUSES CONSOLIDATION ACT.

Compensation under the 8 & 9 Vict. c. 18, s. 63,—See **RAILWAY COMPANY**, 2.

LAUNDER,—See *Gaved v. Martyn*, 732.

LEASE.

Surrender of,—See **BANKRUPT**, 7.

Damages on contract for sale of,—See **VENDOR AND PURCHASER**, 2.

LEASING POWER,—See **POWER**.

LEAT,—See **PRESCRIPTION ACT**.

[LETTERS PATENT.

Construction of specification.

1. The object of the 5 & 6 W. 4, c. 83, authorizing disclaimers, was to enable the patentee, where his specification contains a sufficient and good description of a useful invention, but that description is imperilled or hazarded by something being annexed to it which is capable of being severed, leaving the original description, in its integrity, good and sufficient, without the necessity of addition, to lop off the vicious matter, and leave the original invention as described in the specification untainted by that vicious excess. But it is not competent to him to convert a specification bad, in the sense of its containing no description of any useful invention at all, into a good specification, by adding words which would convert that which is a barren and unprofitable generality into a specific and definite and practical description.

2. The expression “new manufacture” in the 21 Jac. 1, c. 3, not only comprehends “productions,” but it also comprehends the means of producing them,—a new machine, for instance, or a new combination of machinery, or a new process, or an improvement of an old process.

3. The use of a roller and a bowl for calendering and embossing fabrics, and the means of regulating the relative speed of their motion, was well known. In the process of calendering, the roller was smooth, and the speed of the roller and the bowl was unequal: in the process of embossing, the roller was engraved or patterned, and the speed of the roller and of the bowl was equal. The plaintiff took out a patent for a combination of the engraved or patterned roller with the differential speed of the roller and the bowl, in order to effect the two processes by one operation. The patent professed to be for “improvements in embossing and finishing woven fabrics, and in the machinery or apparatus employed therein;” and the novelty professed to consist in the use of rollers having “any design grooved, fluted, engraved, milled, or otherwise indented upon them.” Finding that the effect of the differential speed, where the roller was engraved or indented longitudinally, was, to destroy the fabric, the plaintiff entered a disclaimer, by which, besides abandoning the latter branch of the title of the original patent, he disclaimed “the use of any other description of designs upon the surface of the roller except circular grooves, flutes, or indentations made around its surface:”—

LETTERS-PATENT.

Construction of specification (continued).

Held, by the House of Lords,—affirming the judgment of the court below,—that the process described in the original specification was not the proper subject of a patent; and that the disclaimer was bad, as attempting to turn that which was an impracticable generality into a specific invention not described in the original specification.

4. *Spiral* grooves on the roller, which in their effect could not be practicably distinguished from circular grooves, would be an infringement of the patent. *Ralston v. Smith*, 818.]

LIBEL.

Justification of part.

1. In an action for a libel contained in two letters published in a newspaper, the defendant pleaded, by way of justification, that the second letter (which in itself contained a distinct substantive libel) was a fair comment upon the facts stated in the first letter:—Held, bad. *Walker v. Brogden*, 65.

2. To say of a clergyman that he came to the performance of Divine Service in a towering passion, and that his conduct was calculated to make infidels of his congregation, is libellous. *Ib.*

LIEN,—See ATTORNEY.

LIVERPOOL EQUITABLE CO-OPERATIVE SOCIETY,—See INDUSTRIAL SOCIETIES.

LOSS OF PROFITS,—See RAILWAY COMPANY, 19.

LOWESTOFT HARBOUR,—See SHIPPING, 1.

MASTER AND SERVANT.

Liability of master for injury to a servant.

Negligence of fellow-workman.—To render a master liable for an injury to one in his employ, through the negligence of another person also in his employ, it must be shown that the latter was placed by the master in such a position of trust and authority as to be fairly considered as his representative in the establishment. *Murphy v. Smith*, 361.

Right of a master to sue for a personal injury to his servant,—See RAILWAY COMPANY, 7.

MERGER.

Of simple-contract debt in a specialty.

To operate a merger of a simple-contract debt in a specialty, the specialty must be co-extensive with the simple-contract debt, and between the same parties. *Boaler v. Mayor*, 76.

METROPOLIS LOCAL MANAGEMENT ACT.

Alteration of sewers.

1. Where the vestry or district-board of a parish or district, under the powers conferred on them by the Metropolis Local Management Act, 18 & 19 Vict. c. 120, substitute a new sewer in a course different from that of an old one, and think proper to divert house-drainage (not in itself defective or insufficient) from the latter to the former, they are bound (under s. 69) to provide new drains for the old ones so diverted, and cannot call upon the owners of the premises, under s. 73, to pay the expense of such new drains. *St. Marylebone (Vestry)*, app., *Vicet*, resp., 424.

Width of streets.

2. The 98th section of the Metropolis Management Amendment Act, 1862, provides that “no existing road, passage, or way being of a less width than 40 feet shall be hereafter formed or laid out for building as a street for the purposes of carriage-traffic, unless such road, passage, or way be widened to the full width of 40 feet,”—the measurement to be taken half on either side from the centre or crown of the roadway to the external wall or front of the house, or to the fence or boundary of the forecourt, if any:—Held, that this provision did not apply where the buildings abutted in the rear upon an old lane of less width than 40 feet. *The Metropolitan Board of Works*, app., *Con*, resp., 445.

And see METROPOLITAN BOARD OF WORKS.

METROPOLITAN BOARD OF WORKS.

Compensation for land taken for works of.

1. In 1854, the commissioners of sewers, under the 11 & 12 Vict. c. 112, gave notice to A., the occupier of land under a lease granted by a tenant for life, that they were about to construct a new sewer across the same; and in the early part of 1855 the work was done, no notice having been given to the owner of the fee. The Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120, passed after the work was so done, and came into operation on the 1st of January, 1856. On the expiration of A.’s lease in 1862, B., who had succeeded to the estate on the death of the tenant for life (in November, 1855), for the first

METROPOLITAN BOARD OF WORKS.*Compensation for land taken for works of (continued).*

time became aware of the existence of the sewer, which it was agreed had depreciated the value of the property for building purposes to the extent of 1500*l.*:—Held, that the liability of the commissioners of sewers to compensate B. for such damage was transferred to the metropolitan board of works by virtue of the provisions of the Metropolis Local Management Act, and that the claim was not too late. *In re Pettitward v. Metropolitan Board of Works*, 489.

Compensation for particular damage.

2. The mere temporary obstruction of access to premises, though it may cause some inconvenience and loss of business to the occupier, is not a "damage" in respect of which he is entitled to claim compensation under the 135th and 225th sections of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. *Herring, app., Metropolitan Board of Works*, resp., 510.

METROPOLITAN BUILDING ACT.*"Adjoining owner," within 18 & 19 Vict. c. 122.*

1. A. was lessee for ninety-nine years of premises in the city of London, the whole of which were underlet by him for improved rents to persons who took each an interest in his portion of them greater than that of a tenant from year to year:—Held, that A. was, nevertheless, liable, as an "adjoining owner," to contribute to the expense of repairing or rebuilding a party-wall by his neighbour, under the Metropolitan Building Act, 18 & 19 Vict. c. 122. *Hunt v. Harris*, 18.

2. Whether he had any remedy over against his under-tenants, *quære*? *Ib.*

MISREPRESENTATION,—See FALSE REPRESENTATION.

NEGLIGENCE,—See BANKING COMPANY. RAILWAY COMPANY, 8.

OFFICIAL ASSIGNEE,—See BANKRUPT.

PASSAGE COURT OF LIVERPOOL,—See INDUSTRIAL SOCIETIES.

PLEADING.*Joinder of counts.*

A count for the conversion and a count for the detention of goods ought not to be allowed unless a judge at Chambers is satisfied that substantial justice requires that they should be joined. *Mockford v. Taylor*, 209.

POWDER MAGAZINE,—See INSURANCE.

POWER.*Of leasing.*

1. By a private act of 6 G. 1, c. 29, passed in 1720 for the purpose of confirming a prior settlement of the Shrewsbury estates, those estates were limited to the issue of the settlor as they should succeed to the earldom; and the act contained powers for each successive tenant for life or in tail, to charge the lands for portions for younger children, to jointure, and (by s. 10) to lease all or any part of the lands for three lives or twenty-one years, or for any term of years determinable on three lives, so as there should be reserved and made payable by every such lease the usual and accustomed yearly rents, boons, and services, with a proviso of re-entry for non-payment.

By a subsequent act, passed in 1803, certain out-lying portions of the estate (set out in a schedule annexed to the act, and which included all the lands in the township of Oxton) were conveyed to trustees,—“for ever freed, released and discharged, and absolutely acquitted, exempted, and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisos, limitations, and agreements in and by the settlement and the act of 1720 respectively created, limited, provided, and declared of and concerning the same hereditaments and premises, or any of them, except only such leases as had been theretofore made or granted of the same in pursuance of the powers contained in the said settlement and act,”—in trust to sell, and, on payment of the purchase-money, to convey the same to the purchasers “freed and discharged, and acquitted, exempted, and exonerated as aforesaid,”—the proceeds of such sales to be laid out in the purchase of other lands, to be subject to the same uses, &c., as the lands so sold.

By the 7th section of the act of 1803, it was enacted and declared, that, “in the meantime and until the said manors, lands, &c., thereby directed to be sold, should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents, issues, and profits thereof should be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been

POWER.*Of leasing (continued).*

entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively in case that act had not been made."

In 1838, the then earl granted to one Pim a lease of a portion of the land so vested by the act of 1803 in trustees for sale (and which had not been sold), for ninety-nine years, provided three persons named, or either of them, should so long live, at the yearly rent of 30*l.*, Pim covenanting to lay out 1000*l.* in building on the land within five years:—

Held, that the settlement and act of parliament gave the earl no power to lease the land in question, so as to bind succeeding tenants in tail of the Shrewsbury estates. *The Earl of Shrewsbury v. Knightley*, 606.

2. By a private act of 6 G. 1, c. 29, passed in 1720, for the purpose of confirming a prior settlement of the Shrewsbury estates, those estates were limited to the issue of the settlor as they should succeed to the earldom: and the act contained powers for each successive tenant for life or in tail to charge the lands for portions for younger children, to jointure, and (by s. 10) to lease all or any part of the lands for three lives or twenty-one years, or for any term of years determinable on three lives, so as there should be reserved and made payable by every such lease *the usual and accustomed rents, boons, and services*, with a proviso for re-entry for non-payment.

By an act of 1803, 43 G. 3, c. 40, "for vesting part of the *settled estates* of the Earl of Shrewsbury in trustees for sale," &c., certain outlying portions of the property (set out in a schedule annexed to the act, and which included all the lands in the township of Oxton) were conveyed to trustees,—“for ever, freed, released, and discharged, and absolutely acquitted, exempted, and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisos, limitations, and agreements in and by the settlement and the act of 1720 respectively created, limited, provided, and declared of and concerning the same hereditaments and premises, or any of them, except only such leases as had been theretofore made or granted of the same in pursuance of the powers contained in the said settlement and act,”—in trust to sell, and, on payment of the purchase-money, to convey the same to the purchaser “freed and discharged, and acquitted, exempted, and exonerated as aforesaid,”—the proceeds of such sales to be laid out in the purchase of other lands, to be subject to the same uses, &c., as the lands so sold.

By the 7th section of the act of 1803, it was enacted and declared, that “in the meantime and until the said manors, lands, &c., thereby directed to be sold, should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents, issues, and profits thereof should be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively in case that act had not been made.”

No sale took place under the last-mentioned act. But in 1843 another act passed (6 & 7 Viet. c. 28), for vesting other parts of the *settled estates* of the Earl of Shrewsbury in trustees for sale. The 1st section of this act, after reciting the act of 6 G. 1, c. 29, and the several settlements anterior thereto, vested in trustees the several estates mentioned in the second schedule annexed thereto in terms the same as those contained in the act of 1803, in trust for sale,—“subject and without prejudice to any lease or leases which may have been made under the power of leasing hereinafter contained.” By s. 3 the moneys arising from the sales were to be invested in the purchase of other lands, to be settled and limited to the same uses as the lands so sold were subject to. The 5th section enacted, that, “in the meantime and until such sale or sales as aforesaid, the said manors and other hereditaments hereby vested in trust as aforesaid, or the unsold part or parts thereof for the time being, shall be held and enjoyed, and the rents, issues, and profits thereof be had, received, and taken by and for the benefit of such person or persons as would have been entitled thereto and ought to have held and enjoyed the same in case the same premises had not by this act been so vested in trust as aforesaid.” By s. 6 the power of jointuring in the act of 1720 was repealed, and new powers of jointuring and charging were given by s. 7. The power of leasing created by the 10th section of the act of 1720 was repealed by s. 11: and new powers of leasing were given,—by s. 12, for twenty-one years, by s. 13 for sixty years, by s. 33 for any number of years not exceeding ninety-nine years, in possession, and by s. 40, mining leases,—to “every persons and person to whom the said manors, hereditaments, and premises limited by the settlement and act of 6 G. 1 are by the same settlement and act respectively limited successively as aforesaid, *as and when they shall respectively by virtue of the limitations aforesaid be in the actual possession or entitled to the receipt of the rents and profits of the lands which for the time being shall stand limited and settled*” by the said settlement and act of 6 G. 1, “to such of the uses limited by the said

POWER.*Of leasing (continued).*

settlement and act of 6 G. 1 respectively as aforesaid, as shall then be subsisting or capable of effect :—

Held, that a lease made by an Earl of Shrewsbury, after the passing of the act of 1843, of part of the lands which had been vested in trustees for sale by the act of 1803, was a valid lease under the power of leasing contained in the 33d section of the act of 1843. *The Earl of Shrewsbury v. Beazley*, 661.

PRACTICE.*Joinder of causes of action.*

Since the Common Law Procedure Act, 1852, s. 40, a count for breaking and entering the premises of the husband may be joined with a count by the husband and wife for assaulting and imprisoning the wife. *Morris v. Moore*, 359.

Making submission to reference a rule of court,—See ARBITRATION.

And see AMENDMENT.

PRESCRIPTION ACT.*Profit à prendre in gross.*

1. The statute 2 & 3 W. 4, c. 71, does not apply to easements or profits à prendre in gross, e. g. to a claim of "a free-fishery" in the waters of another. *Shuttleworth v. Le Fleming*, 687.

Rights to easements under the 2 & 3 W. 4, c. 71.

2. One who by lease or by license from the owner of the soil has the right of digging and working clay (or minerals) thereunder, has such an interest in the soil as will entitle him to claim under the Prescription Act, 2 & 3 W. 4, c. 71, a right to the flow of water over the surface by a twenty years' user. *Gaved v. Martyn*, 732.

3. A right to the flow of water along an artificial cut on the soil of another cannot be acquired under the Prescription Act, 2 & 3 W. 4, c. 71, unless the circumstances under which the cut was made show that it was intended to be of a permanent character. *Ib.*

4. H. occupied clay-works, and, for the more convenient use of them, in 1830, under an agreement with one G. (with the consent of G.'s landlord), made a leat or artificial cut for the purpose of conducting water from a brook flowing over the land in G.'s occupation, to his works. The plaintiff in 1835 succeeded H. in the occupation of the clay-works, and continued for upwards of twenty years, without interruption, the enjoyment of the leat :—Held, that, notwithstanding the plaintiff had no notice of the agreement between H. and G., there was evidence from which the jury might find that the plaintiff had not enjoyed the stream for twenty years as of right. *Ib.*

5. The rights of tin-bonders according to the customary law of Cornwall to the use of water within their tin-bounds, for the purpose of streaming their tin, will not prevent the acquisition by another of a prescriptive right under the 2 & 3 W. 4, c. 71, to the enjoyment of the water by a twenty years' user : nor will this right be affected by an agreement with the tin-bonders for a money payment to abstain from fouling the water by streaming their tin therein. *Ib.*

PRINCIPAL AND AGENT.*Liability of principal for acts of his agent.*

A., a carrier between Hull and the continent, employed B. as his agent to carry goods between Hull and Manchester, the course of business being to deliver the goods to the consignee immediately on their arrival. C., a customer, requested B. not to deliver goods consigned to him, but to send him notice of their arrival, and await his orders. To this B. assented, A. being ignorant of the arrangement. A quantity of cotton-waste consigned to C. from Lille arrived at Hull and was forwarded thence to Manchester by B.; but B. omitted to give C. notice of its arrival, and C. in consequence sustained loss :—Held, that A. was not responsible. *Butterworth v. Brownlow*, 409.

PRINCIPAL AND SURETY.*Release of surety.*

A transaction which would otherwise operate as a release of a surety,—such as, giving time to the principal debtor,—will not have that effect, either at law or in equity, if the remedy against the surety is expressly reserved. *Bealer v. Mayer*, 76.

PROFIT A PRENDRE,—See PRESCRIPTION ACT.

PROMISSORY NOTE,—See BILL OF EXCHANGE.

PROVIDENT SOCIETIES,—See INDUSTRIAL SOCIETIES.

QUIET ENJOYMENT,—See VENDOR AND PURCHASER, 5.

RABBITS,—See **SHOOTING**, 1, 2.

RAILWAY COMPANY.

Liability of, as carriers.

Declaration of value of animals to be carried.—1. By the 7th section of the Railway Traffic Act, 17 & 18 Vict. c. 31, a railway company is not liable for loss of or injury to a horse on the railway, beyond the value of 50*l.*, unless the sender shall at the time of delivering it to the company to be carried have declared it to be of a higher value, in which case the company are empowered to charge a reasonable percentage for the increased risk and care thereby occasioned:—Held, that the declaration of value must be such as to convey a distinct intimation to the company that the sender intends to hold them responsible for the higher sum. *Robinson v. The London and South Western Railway Company*, 51.

2. Where, therefore, a servant of a railway company, having casually learned that a mare tendered for carriage was worth 135*l.*, refused to carry her unless insurance-money was paid beyond the usual charge for carriage:—Held, that the company were responsible for such refusal. *Ib.*

3. *Semble*, that the declaration of value need not be made at the moment of tendering the animal to be carried. *Ib.*

Contract for carriage of passengers.

4. *Delay.*—The mere taking of a ticket for a journey by railway does not amount to a contract on the part of the railway company, or impose upon them a duty, to have a train ready to start at the time at which the passenger is led to expect it. *Hurst v. Great Western Railway Company*, 310.

5. *Loss of luggage.*—“Ordinary luggage,” for which a railway company is responsible, does not include title-deeds belonging to a client which an attorney is carrying with him in his bag or portmanteau for the purpose of producing on a trial in a local court; or bank-notes (to a considerable amount) carried by him for the purpose of meeting the exigencies of the suit. *Phelps v. The London and North Western Railway Company*, 321.

Liability for injury to a passenger.

6. One who is no party to a contract cannot sue in respect of the breach of a duty arising out of the contract. *Alton v. The Midland Railway Company*, 213.

7. An action will not lie against a railway company, as carriers of passengers for hire, at the suit of a master, for a personal injury sustained through their negligence by his servant, whereby the master lost the benefit of the services of the servant,—the contract out of which arose the duty to carry safely being a contract between the company and the servant. *Ib.*

Action against, for negligence.

8. *Dangerous structure.*—A railway company, for the more convenient access for passengers between the two platforms of a station, erected across the line a wooden bridge, which the jury found to be dangerous: Held, that the company were liable for the death of a passenger through the faulty construction of this bridge, although there was a safer one about one hundred yards further round, which the deceased might have used. *Longmore v. Great Western Railway Company*, 183.

Compensation under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 68.

9. *Inquisition quashed.*—The plaintiff having given notice to the defendants, a railway company, under the 68th section of The Lands Clauses Consolidation Act, 1845, that his premises had been injuriously affected by the execution of their works, and that he demanded compensation and an assessment before a jury, the defendants issued their warrant, and a jury was summoned, who found that the plaintiff was not entitled to any compensation. The plaintiff thereupon obtained a rule in the Queen's Bench to quash the inquisition and the verdict and judgment thereon, and gave the company a fresh notice, and, the company not issuing another warrant, the plaintiff brought this action:—Held, that, the original warrant remaining unimpeached, the sheriff was bound to go on under it, by summoning a fresh jury, and that the company were in no default. *Horrocks v. Metropolitan Railway Company*, 139.

10. Held by the Exchequer Chamber,—reversing the judgment of the Court of Common Pleas,—that an injury to the goodwill or a loss of profit in the business of a shop, caused by an obstruction, whether permanent or temporary, of a highway, in the lawful execution of the works of a railway company, where no part of the land on which the business is carried on is taken or otherwise injuriously affected, is not the subject of compensation under the 68th section of the Lands Clauses Consolidation Act, 1845. *Cameron v. The Charing Cross Railway Company*, 764.

RAILWAY TRAFFIC ACT,—See **RAILWAY COMPANY**, 1, 2.

RECITAL,—See **COVENANT**.

RELEASE,—See **BANKRUPT. PRINCIPAL AND SURETY.**

RETURN-TOLL,—See **TURNPIKE ACT.**

REVERSION,—See **TENANTS IN COMMON.**

RIGHT TO SUPPORT,—See **VENDOR AND PURCHASER, 1.**

SALE.

Of goods.

Subject to a condition.]—1. Coals were sold at Hull, and shipped on board a vessel chartered by the buyer, to be paid for in cash against bill of lading in the hands of the seller's agent in London:—Held, that no property passed to the buyer until the condition was fulfilled, and that, the price being unpaid, the seller was entitled to intercept the delivery. *Moakes v. Nicolson*, 290.

2. Held, also, that a third person, who had agreed with the vendee to purchase the coals of him, by a verbal contract entered into before the quantity was ascertained and shipped, could be in no better position than the original vendee. *Ib.*

3. *Tender of part.*]—A contract for the sale of cotton of a given quality is not performed on the part of the seller, by a tender of a larger quantity, out of which the buyer is required to select those bales which answer the description of the cotton contracted for. *Hylands v. Kreitman*, 351.

Of land,—See **VENDOR AND PURCHASER.**

SEWERS.

Alteration and diversion of,—See **METROPOLIS LOCAL MANAGEMENT ACT.**

And see **METROPOLITAN BOARD OF WORKS.**

SHARE-BROKER.

Within 57 G. 3, c. 60. *Scott v. Jackson*, 134.

SHIPPING.

Bill of lading.

1. *Detention of vessel.*]—Timber was consigned by the plaintiff's ship Johan to the defendant, and landed and delivered to him in a harbour by the statute for the regulation of which certain dues were payable thereon by him. The defendant failing to pay these dues, the Johan was detained for nine days by the harbour authorities, at the expiration of which time the master obtained her release by paying the demand himself:—Held, that, —assuming that the defendant was by the statute liable to pay the dues, and that the detention of the vessel was justifiable,—the plaintiff was only entitled to recover the amount he had paid for the dues, but not damages for the time the vessel was detained; inasmuch as he might at once have procured her release by payment of the money. *Moller v. Jocka*, 332.

2. *Prepayment of freight.*]—Coals were shipped at Sunderland under a charter-party between one De M. and the defendant (the owner of the vessel), whereby and by the bill of lading they were made deliverable at Alexandria to order or assigns. The charter-party contained the following stipulation,—“The freight to be paid on unloading and right delivery of the cargo less advances in cash at current rate of exchange: One-half of the freight to be advanced by freighter's acceptance at three months, on signing bills of lading: Owner to insure the amount, and deposit with charterer the club-policy, and to guarantee same.” On receiving the acceptance (which became due on the 3d of February, 1864), the agent for the ship endorsed on the bill of lading a receipt for “301*l.* 17*s.* 6*d.*, as per charter-party.” De M. endorsed the bill of lading in blank, and forwarded it to the plaintiff (for whom the coals had been purchased) at Alexandria. The plaintiff, on the ship's arrival at Alexandria on the 5th of January, 1864, demanded the delivery of the cargo; but the master (having heard that De M. had stopped payment) refused to deliver it unless he received the full freight or a guarantee for its payment. The plaintiff thereupon caused his agents B. & Co. to give the required guarantee, and the coals were delivered. At this time the bill of exchange was outstanding in the hands of a third person: but the defendant had taken it up before this action was brought. B. & Co. declining to pay more than the half freight, the master sued them on their guarantee in the Consular Court, and B. & Co. paid the whole freight under protest. In an action by the plaintiff for the wrongful delivery of the coals,—Held, that the defendant had no lien upon the cargo for the amount represented by the bill of exchange; and that the plaintiff was entitled to recover it as damages in this action; and that his right was not affected by the proceedings which took place in the Consular Court. *Tamsaco v. Simpson*, 463.

SHIPPING.

General average.

3. *Prepaid freight.*—By a charter-party for a voyage from Cardiff to San Francisco with a cargo of coals, the owners engaged to deliver the same "on being paid freight at and after the rate of 4l. 10s. per ton of 20 cwt. delivered;" and the instrument contained the following stipulation,—“The freight to be paid by good and approved bills on London at six months’ date from date of sailing, less cost of insurance, to be effected by the charterer at ship’s expense, or in cash, under discount equal thereto, at charterer’s option; less, in either case, 800l., which is to be paid on delivery of cargo, in cash, at the current rate of exchange.” The freight, to the extent of 4807l., was paid in advance, and a general average loss was sustained on the voyage:—Held, that the owners were not liable to contribute to such general average in respect of the freight so advanced, but only in respect of the 800l. which was to be paid at the end of the voyage; but that the charterers, who had an insurable interest in that portion of the freight, were the parties to contribute. *Frayes v. Worms*, 159.

4. *Jettison.*—Deck-cargo (timber) lawfully laden pursuant to charter-party, having broken adrift in consequence of stormy weather, and impeding the navigation and endangering the safety of the vessel, was necessarily thrown overboard:—Held, that the shipper was entitled to claim general average in respect thereof, as against the shipowner. *Johnson v. Chapman*, 563.

Registration of steam-vessels.

5. *Measurement of space for propelling power.*—The 29th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which empowers the commissioners of customs, with the approval of the board of trade, to make “such modifications and alterations as from time to time become necessary in the tonnage-rules thereby prescribed, in order to the more accurate and uniform application thereof and the effectual carrying out of the principle of admeasurement therein adopted,” does not authorize them to make rules for the measurement of the tonnage of steam-vessels which will have the effect of altering the allowance in respect of the space occupied by the propelling-power, as provided by s. 23. *City of Dublin Steam-Packet Company v. Thompson*, 553.

Damages for collision.—See DAMAGES.

SHOOTING.

Reservation of right of shooting and sporting.

1. A reservation in a lease, of the right of “shooting and sporting” over the land demised, is not limited to “game,” strictly so called, but reserves to the lessor the exclusive right to follow and shoot such animals as are in common parlance understood to be the subject of sport. *Jeffries v. Evans*, 246.

2. In 1857, A. demised to B. a farm called Upton Farm, containing 260 acres, about 40 of which consisted of timber and underwood, with furze-covers in various other parts of the farm. This lease reserved to the lessor “all timber and other trees, mines, minerals, and quarries on the said farm,” and also “the exclusive right of shooting, fishing, and sporting on the said farm,” with liberty to the lessor, his servants, &c., and others by his authority, at all seasonable times to enter for any of the purposes contained in the reservations therein contained. In 1860, A. demised Upton Castle and about 60 acres of land adjoining it to C., and also “the exclusive right of shooting and sporting over and taking the game, rabbits, and wild-fowl upon the said premises and also upon the entire manor of Upton,” including the 260 acres under lease to B.—reserving to the lessor “all trees, underwood, thorns, and bushes growing on the land, as well as all mines, minerals, and quarries,” &c.; with a covenant for quiet enjoyment, without interruption by the lessor or any person or persons lawfully claiming by, from, or under him, &c. B., finding the rabbits too numerous, by means of ferrets and guns destroyed a large number of them: he also cut all the underwood on his farm, and grubbed up and destroyed the furze-covers, and thereby materially interrupted and injured C.’s right of sporting:—Held, that, inasmuch as these acts on the part of B. were not warranted by the terms of the demise to him, they did not constitute a breach of A.’s covenant for quiet enjoyment in the lease of 1860. *Id.*

Disturbance of right.

3. By a memorandum not under seal, the plaintiff hired of the owner of land the sole and exclusive liberty of shooting and fishing over it for three years. A portion of the land was (pending the term) sold to the defendants, who constructed a line of railway across it, to the great detriment of the plaintiff’s right of sporting:—Held, that the plaintiff had not such an interest in the land as to entitle him to claim compensation under the Lands Clauses Consolidation Act, 1845. *Bird v. The Great Eastern Railway Company*, 268.

4. *Semble*, that a grant under seal would have given him no better title. *Id.*

SHREWSBURY ESTATE ACTS,—See **POWER**.

SPECIAL JURY.

Summoning, &c.,—See **ERROR**.

SPECIALTY DEBT,—See **MARRIAGE**.

SPORTING,—See **SHOOTING**.

STAGE-CARRIAGE.

Return toll,—See **TURNPIKE ACT**.

STEAM-VESSELS.

Measurement of,—See **SHIPPING**, 5.

SURETY,—See **PRINCIPAL AND SURETY**.

SURRENDER.

Of lease by bankrupt,—See **BANKRUPT**, 7.

SURVEYORS' FEES,—See **VENDOR AND PURCHASER**, 7.

SURVEYOR OF HIGHWAYS,—See **HIGHWAYS**.

TENANTS IN COMMON.

Joinder of, in action for breach of covenants in a joint lease.

Covenant on a joint lease of certain land by two tenants in common, whereby they demised the land according to their several estates to the lessees, who covenanted with them and their respective heirs and assigns to repair. It then deduced a title to the plaintiffs as the assignees of one only of the undivided shares, traced the lease to the defendant's testator, and assigned a breach by him of the covenant to repair in the time of the plaintiffs:—Held, on demurrer, that both the tenants in common of the reversion at the time of the breach ought to have joined as plaintiffs in the action. *Thompson v. Habersell*, 713.

TENDER,—See **CONTRACT**, 2.

TIN-BOUNDERS.

Rights of.

The rights of tin-bounders, according to the customary law of Cornwall, to the use of water within their tin-bounds, for the purpose of streaming their tin, will not prevent the acquisition by another of a prescriptive right under the 2 & 3 W. 4, c. 71, to the enjoyment of the water by a twenty years' user: nor will this right be affected by an agreement with the tin-bounders for a money payment to abstain from fouling the water by streaming their tin therein. *Gaved v. Martyn*, 732.

TOLL,—See **TURNPIKE ACT**.

TRAFFIC ACT,—See **RAILWAY COMPANY**, 1, 2.

TURNPIKE ACT.

Construction of local turnpike-act: stage-carriage.

Return-toll.]—By a local turnpike act (3 G. 4, c. lxx.), the following tolls (amongst others) were imposed,—

"1. For every horse, &c., drawing any coach, barouche, sociable, berlin, chariot, landau, chaise, calash, chair, phaeton, caravan, taxed-cart, hearse, litter, or other such light carriage (except stage-coaches), a sum not exceeding 4½d. :

"2. For every horse, &c., drawing any stage-coach licensed to carry in the whole, inside and outside, not more than nine passengers, a sum not exceeding 4½d. :

"3. For every horse, &c., drawing any stage-coach licensed to carry in the whole, inside and outside, more than nine, and not exceeding sixteen passengers, a sum not exceeding 6d. :

"4. For every horse, &c., drawing any stage-coach licensed to carry in the whole, inside and outside, more than sixteen passengers, a sum not exceeding 8d. :

"5. For every horse, &c., drawing any caravan, tilted-wagon, tilted-cart, or other carriage employed in carrying passengers for a fare, a sum not exceeding 4½d. :

"11. For every stage-coach or other public carriage having more passengers than the same is allowed to carry, or having a greater weight of luggage upon the top of the same than is authorized by law, or having passengers riding upon the top of such luggage," double the usual toll.

A subsequent clause provided that no person should pay toll more than once in any one day for passing and repassing with the same horse or horses: and s. 49 provided that "the tolls should be payable for or in respect of all stage-coaches and other such public carriages

TURNPIKE ACT.

Construction of local turnpike act (continued).

licensed or not licensed, for every time of passing and repassing through the same turnpike on the same day."

A., a carrier, travelled to and from Ashcott and Bridgewater three times a week with a light spring van on four wheels, drawn by one horse (for which he paid duty under the 16 & 17 Vict. c. 90, sched. D), which did not travel more than four miles an hour, and which was principally and bona fide used for the carrying of goods and merchandise, but, occasionally also for conveying passengers for a fare, never more than six:—Held, that he was not liable, under s. 40 of the local act, to return-toll. *Pearson, app., Taxewell, resp.*, 284.

VENDOR AND PURCHASER.

Construction of contract.

1. A. was possessed of a piece of land which was laid out for building and offered for sale in lots, subject to certain conditions, one of which was as follows:—"The purchaser will be required to covenant to build according to the elevation of lot 2, or such other elevation as the vendor shall approve." By another condition it was provided that the walls between the several lots when built should be deemed party-walls, and that, if erected by the purchaser of any one of such lots, the owner of the adjoining lot should be bound to pay him one-half the cost if he should make use of the same. On the 12th of May, 1863, the defendant became the purchaser of lot 6, and on the 26th the plaintiff became the purchaser of lot 7, both purchases being declared to be "subject to the above conditions." When the plaintiff took possession of lot 7, there was on it an ancient party-wall 15 feet high adjoining lot 6; and the plaintiff raised this wall to the height of 24 feet. The defendant afterwards took possession of lot 6, and proceeded to excavate the land for the purpose of erecting thereon a building in accordance with his agreement. This was done in a proper manner, and so as not to have affected the ancient wall on lot 7 if it had remained in its original state: but the withdrawal of so much of the lateral support of lot 7 rendered the soil insufficient to sustain the additional weight which the plaintiff had placed thereon, and the building in consequence fell:—

Held, that the defendant was not liable; he having done no more than he was required (or licensed) by his agreement with A. to do. *Murchie v. Black*, 190.

Damages on breach of contract for the sale of a leasehold.

2. The rule in *Flureau v. Thornhill*, 2 W. Bla. 1078, that, where a contract of sale of real estate goes off in consequence of a defect in the vendor's title, the vendee is not entitled to damages for the loss of the bargain, does not apply to the case of a lease granted by one who has no title to grant it. *Lock v. Furze*, 96.

3. And it makes no difference that the lease is a lease in reversion, and not in possession,—at all events, where the lessee is already in possession of the premises under a valid subsisting lease. *Ib.*

4. A plea to an action for breach of the covenant for quiet enjoyment in such a lease,—that the plaintiff never had or entered into possession of the demised premises under or by virtue of the lease,—held bad, as attempting to put in issue matter neither expressly nor impliedly alleged in the declaration. *Ib.*

5. A. was in possession of premises under a lease from B. which would expire on the 4th of December, 1864. In February, 1860, A., in consideration of a premium of 400*l.*, obtained from B. a further lease of the same premises for twenty-one years and twenty-one days, to commence from the expiration of the former lease. On the death of B., in 1863, it was found that B. was only tenant for life, with power to grant leases in possession, and not in reversion, and consequently that the lease so granted by him to A. in February, 1860, was void. A. thereupon obtained from the reversioners a fresh lease for seven years, at a considerable increase of rent, and sued C. (B.'s executor) upon the covenant for quiet enjoyment contained in the void lease:—Held,—upon the authority of *Williams v. Burrell*, 1 C. B. 402,—that A. was entitled to recover (besides the 400*l.* premium and the costs of preparing the void lease) the difference in value between the term professed to be granted to him by that lease and the seven years' term which he obtained from the reversioners. *Ib.*

6. Held, also, that, in estimating the value of the term which the lessee had lost, it was not competent to the jury to give 10 per cent. in addition, as on a compulsory sale, by analogy to the practice in the case of lands taken by a railway or other public company. *Ib.*

7. Counsel's and surveyors' fees for advising on title, &c., not allowed as part of the costs of a lease. *Ib.*

VESTED ESTATE,—See DEVISE.

